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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 222

STATE OF MISSOURI AT THE RELATION OF MISSOURI INSURANCE COMPANY, APPELLANT,

vs.

FREDERICK GEHNER, AS ASSESSOR OF THE CITY OF ST. LOUIS AND AS PRESIDENT OF THE BOARD OF EQUALIZATION OF THE CITY OF ST. LOUIS, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

FILED JULY 8, 1929

(34,353)

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[fol. 1] [Caption omitted]

IN SUPREME COURT OF MISSOURI

APRIL TERM, 1926

STATE OF MISSOURI at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator,

vs.

FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. Schollmeyer, Clyde Carson, William L. Heckmann, and Joseph J. Lichtenfeld, as Members of the Board of Equalization of the City of St. Louis, Respondents

NOTICE OF APPLICATION FOR WRIT OF CERTIORARI

To the Honorable Frederick Gehner, as assessor of the City of St. Louis and as President of the Board of [fol. 2] Equalization of said city, and to A. R. Schollmeyer, Clyde Carson, William L. Heckmann, and Joseph J. Lichtenfeld, as members of the Board of Equalization of said city:

You are hereby notified that the undersigned will file in the Supreme Court of the State of Missouri at Jefferson City, Missouri, on the 23rd day of September, 1926, at 9:00 o'clock a. m., its application for a writ of certiorari and suggestions in support thereof, copies of which application and suggestions are hereto attached and made a part of this notice.

You are further notified that said application will be presented to said Court at said time, or as soon thereafter as the Court can hear the same.

Dated this 16th day of September, 1926.

Missouri Insurance Company, Relator, by Jones, Hocker, Sullivan & Angert, Its Counsel.

Received a copy of the foregoing notice and exhibits thereto attached this 16th day of September, 1926.

(Signed) Oliver Senti, Attorney for Respondents.

IN SUPREME COURT OF MISSOURI

[Title omitted]

[fol. 3] APPLICATION FOR WRIT OF CERTIORARI—Filed Sept. 17, 1926

To the Honorable Judges of the Supreme Court of Missouri:

Your petitioner, Missouri Insurance Company, relator herein, respectfully shows to the Court:

1. That the relator, Missouri Insurance Company, is and was at all times herein mentioned a corporation organized and existing under the laws of the State of Missouri pertaining to the formation of life and accident insurance companies, and engaged in the business of writing insurance upon the lives of individuals in Missouri and elsewhere.

2. That Frederick Gehner is now, and has been since the 24th day of April, 1925, the duly elected, qualified and acting Assessor of the City of St. Louis, Missouri, and as such, head of the Assessment Division established by the Charter of said City, and President of the Board of Equalization of said city, and that A. R. Schollmeyer, Clyde Carson, William L. Heckmann and Joseph J. Lichtenfeld, with the said Frederick Gehner, during the year 1926, composed the Board of Equalization of said City by due appointment of the Mayor thereof.

3. That the said Frederick Gehner, as such Assessor and as President of the Board of Equalization, as aforesaid, is the official custodian of all the records, documents and files of the Assessor's office of the city of St. Louis and also of the Board of Equalization of said City.

4. That subsequent to June 1, 1925, and as of date June 1, 1925, as required by law, the relator made return in due form to the Assessor of the City of St. Louis, aforesaid, of all of its property for taxation; that in said return and as a basis for arriving at the taxable value of its property the [fol. 4] relator set down its personal property as follows, to-wit:

Money deposited in bank or other safe place	$5,265.33
Bonds, whether State, County, Town, City, Township, incorporated or unincorporated companies of the value of	349,000.00
Total personal assets subject to taxation in the State of Missouri	$354,265.33

5. That relator's said return also showed deductions claimed by it under the provisions of Revised Statutes of Missouri, 1919, Section 6386, as follows:

Amount of legally required reserve necessary to reinsure its outstanding risks on June 1, 1925, deposited with the State of Missouri for the protection of policyholders	$326,522.69
Amount of unpaid policy claims June 1, 1925	6,964.00
Total deductions	$333,486.69

That on said return and the facts as the same existed after making said deductions the net amount of relator's personal property subject to taxation on June 1, 1925, was Twenty Thousand Seven Hundred Seventy-eight Dollars and Sixty-four cents ($20,778.64), and the relator states that said return was and is true and correct.

6. That notwithstanding the aforesaid facts, the respondents, acting as the Board of Equalization of the City of St. Louis, Missouri, did, on March 31, 1926, duly notify the relator of their intention to assess the relator for taxes for the year 1926 on personal property as follows:

Cash deposited in bank or other safe place	$5,260.00
Solvent bonds	349,000.00

and by said notice, required the relator to appear before said Board at a time stated, and show cause why such assessment should not be made.

That thereafter, in conformity to said notice, the relator, [fol. 5] by its officers and attorneys, appeared before said Board and a hearing was had under said notice, and evi-

dence duly heard and considered by the Board; that after hearing the evidence and the objections to the proposed assessment by the relator, said Board made its findings under the evidence that the total amount of the assets of the relator, to-wit, Three Hundred Fifty-four Thousand Two Hundred Sixty-five Dollars and Thirty-three cents ($354,265.33), as listed in said return, was correct, and that the amount of the legally required reserve of relator, on June 1, 1925, was Three Hundred Twenty-six Thousand Five Hundred Twenty-two dollars and Sixty-nine Cents ($326,522.69) and its unpaid policy claims on said date, Six Thousand Nine Hundred Sixty-four Dollars ($6,964.00); that said Board also found and determined that notwithstanding such legally required reserve and unpaid policy claims, the assets listed were subject to taxation in proportion to their value, and that the relator was not entitled to deduct therefrom the amount of said legally required reserve and unpaid policy claims; that thereupon, on April 10, 1926, said Board duly entered its finding and order assessing the relator without regard to such deductions, and fixed the total amount of personal property owned or held by the relator on June 1, 1925, at Fifty Thousand Dollars ($50,000.00), to which action the relator duly entered its protest, and such protest was made a part of the records of said Board.

7. The relator further states that the attempted assessment by said Board of Equalization of the City of St. Louis against the relator, as aforesaid, is without warrant of law and is void; that unless such assessment and the records thereof be quashed, set aside and for naught held, the Assessor of the City of St. Louis will include the same in the assessment roll against the relator and taxes will be levied and tax bills will, in due course, issue thereon against the relator for the payment by the relator of taxes based on [fols. 6-9] said illegal and void assessment, by reason of which facts the relator has no adequate ordinary remedy at law.

Wherefore, in consideration of said facts, the relator prays that a writ of certiorari may issue herein, directed to the said Frederick Gehner, Assessor of the City of St. Louis and President of the Board of Equalization thereof,

demanding him to certify to this Court a true, perfect and complete copy of (1) the return for taxation made by the relator as of June 1, 1925, to the said Frederick Gehner as Assessor of the City of St. Louis; (2) the Assessment made and entered by said Board of Equalization of the City of St. Louis upon its records under date of April 10, 1926, assessing the relator for taxation for the year 1926; and (3) the complete record of said Board and of said Assessor's office of the City of St. Louis respecting said assessment against the relator; and that upon being so possessed of the records aforesaid, this Court will be pleased to order and adjudge that the action of the Board of Equalization of the City of St. Louis, as aforesaid, in assessing against the relator on its assets, without allowing deductions for its legally required reserve and unpaid policy claims be set aside and for naught held, and for such other and further relief as to the Court may seem meet and proper in the premises.

(Signed) Jones, Hocker, Sullivan & Angert, Attorneys for Relator.

Duly sworn to by H. G. Alewel. Jurat omitted in printing.

[fol. 10] IN SUPREME COURT OF MISSOURI

[Title omitted]

WRIT OF CERTIORARI AND MARSHAL'S RETURN

The State of Missouri to Frederick Gehner, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis, and A. R. Schollmeyer, Clyde Carson, William L. Heckmann, and Joseph J. Lichtenfeld, as members of the Board of Equalization of the City of St. Louis, Missouri, Greeting:

Whereas it has been represented to the Supreme Court of the State of Missouri, on the part of the Missouri Insurance Company, as indicated and set forth in a certain petition for a writ of certiorari, a copy of which is hereto attached and made a part hereof; and we being willing to maintain the rights of the State of Missouri and the laws and customs thereof:

Now, therefore, it is ordered and commanded by the Court here that you, the said Frederick Gehner, as Assessor of the City of St. Louis and President of the Board of [fol. 11] Equalization thereof, do certify to this court on or before the 29th day of October, 1926, a true, perfect and complete copy of (1) the return for taxation made by the relator as of June 1, 1925, to the said Frederick Gehner, as assessor of the City of St. Louis; (2) the assessment made and entered by said Board of Equalization of the City of St. Louis upon its records under date of April 10, 1926, assessing the relator for taxation for the year 1926; and (3) the complete record of said Board and of said assessor's office of the City of St. Louis respecting said assessment against relator, in order that this court may adjudicate upon the regularity of said proceeedings and pass judgment upon the legality of your action, without allowing deductions for its legally required reserve and unpaid policy claims; and you are Commanded, in the meantime, to take no further steps in said matter until the further order of this court. Herein fail not at your peril and have you then and there this writ.

In testimony whereof I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson, this 29th day of September, 1926.

J. D. Allen, Clerk.(Seal.)

The return and service shown on the back of said writ is in words and figures following, to-wit:

The undersigned, City Counselor, within and for the City of St. Louis, Mo., hereby accept service of the within Writ of Certiorari for all of the within named respondents.

Dated at St. Louis, Mo., this — day of October, 1926.

Julius T. Muench, by Oliver Senti.

[fol. 12] State of Missouri, ss:

Supreme Court

Executed the within Writ of Certiorari in the City of St. Louis, State of Missouri, on the 9th day of October, 1926, by delivering a true copy of the within writ and petition for the within named Frederick Gehner, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis, and by delivering a

true copy of the within writ for the within named A. R. Schollmeyer, Clyde Carson, William L. Heckmann and Joseph J. Lichtenfeld as members of the Board of Equalization, to Julius T. Muench, City Counselor, who accepted service in writing for all of the within named respondents.

Given under my hand this 9th day of October 1926.

H. C. Schult, Marshal of the Supreme Court of Missouri.

IN SUPREME COURT OF MISSOURI, EN BANC

[Title omitted]

STIPULATED RECORD—Filed Dec. 12, 1928

Now, at this day, come the relator and respondents, by their respective counsel, and stipulate and agree that for the purpose of this cause the record therein may be taken as follows:

[fol. 13] (1) That the relator, Missouri Insurance Company, a corporation, is a domestic insurance company organized under the laws of the State of Missouri, having its principal office in the City of St. Louis, Missouri; that within the time provided by law there was served upon the relator by a Deputy Assessor of the City of St. Louis, State of Missouri, a printed blank form of return for the return of assessable property of relator as of June 1, 1925, as a basis for the assessment of taxes for the year 1926, and that upon said form, within the time required by law, the relator, by H. G. Alewel, its Secretary, made a return, the pertinent parts of which so far as this controversy is concerned, are as follows:

Return

Missouri Insurance Company, St. Louis, Missouri

December 8th, 1925.

Assets, Real Estate, Improvement, etc.	$142,000.00
Bonds, Municipals	289,000 00
Bonds, Government	94,000.00
Bonds, Mortgages	60,000.00
Cash	5,265.33
	$590,265.33

Reserve

Standard Table of Mortality with 3½% interest	$263,000.00
Unearned Premium, 50% Casualty	10,225.58
Reserve for Disability Sick claims	50,000.00
Reserve for Assessment Policies	3,297.11
	$326,522.69

Missouri Insurance Company, St. Louis, Missouri

December 8th, 1925.

The net value of all other assets or values of the Missouri Insurance Company, in excess of the legally required reserve necessary to reinsure its policies and in excess of unpaid policy claims is		$30,778.64
Total Assets		$590,265.33
Less Real Estate assessed as above and on which the Company pays taxes	$142,000.00	
Less reserve required by law	326,522.69	
Less U. S. Government Bonds	94,000.00	
[fol. 14] Less Deposits and assets in other states	0.00	
Less Unpaid Policy claims, sick	5,143.00	
Less Unpaid Policy claims, death	1,821.00	
		$569,486.69
		$30,778.64

(Signed) H. G. Alewel, Secretary Missouri Insurance Company. (Seal.)

Subscribed and sworn to before me this 8th day of December, 1925. (Signed) Clara E. Adelsberger, Notary Public, City of St. Louis, State of Missouri. My term expires Nov. 22, 1926.

(2) That thereafter on April 1, 1926, the Board of Equalization of the City of St. Louis, by its Secretary, Ralph J.

Panzier, caused to be served upon the relator a notice that such Board proposed to assess relator on said return for taxes on personal property as follows: Cash deposited in bank or other safe place, $5,260.00; solvent bonds, $349,000.00, and requiring the relator to appear before said Board on April 6, 1926, at 10:00 o'clock A. M.; that thereafter, pursuant to said notice, the relator appeared before said Board and protested the assessment of any of its property in excess of the sum of $30,778.64, the amount of taxable personal property shown by its said return as having been owned by said relator on June 1, 1925; that the objections and protests of relator were heard by said Board on said 6th day of April, 1926, and the matter of such assessment taken under advisement by said Board; that thereafter, on April 10th, 1926, said Board made its finding and assessment against relator, as shown by the entry of record in the official proceedings of said Board, which record is as follows:

STATE OF MISSOURI,
City of St. Louis, ss:

April 10, 1926.

[fol. 15] In the Matter of the Assessment of the MISSOURI INSURANCE COMPANY

On the 6th day of April, 1926, at ten o'clock A. M., the matter of the assessment as of June 1, 1925, for general taxes for the year 1926, against the Missouri Insurance Company, came on for hearing on the citation issued by this Board to the said Missouri Insurance Company dated, March 31, 1926, which citation is in words and figures as follows:

Personal Property

BEFORE THE BOARD OF EQUALIZATION OF THE CITY OF ST. LOUIS

St. Louis, March 31, 1926.

Missouri Insurance Company, Mr. H. G. Alewell, Secretary,

Olive St. and Vendeventer Ave., City.

GENTLEMEN: You are hereby notified that the Board of Equalization of the City of St. Louis, in session convened in

the office of the Assessor of the Revenue, Rooms, 114-5-7 City Hall, has proposed to assess you for the taxes of 1926 on personal property, as follows, to-wit: Cash deposited in bank or other safe place, $5,260.00; solvent bonds, whether state, county, town, city, township, incorporated or unincorporated companies, $349,000.00.

You are further notified that if you wish to take exception to the proposed action of the said Board, you may appear before this body on the 6th day of April, 1926, at 10:00 o'clock A. M.

Respectfully, Ralph J. Panzier, Secretary.

Served the within citation on H. G. Alewell, Secretary of the Missouri Insurance Company, by delivering to him a true copy thereof.

S. J. Lane, Deputy Marshal.
April 1st, 1926.

The Missouri Insurance Company was represented by Mr. Ralph T. Finley, its attorney, and evidence having been heard and considered by the Board, the matter was taken under advisement by the Board, and the further consideration of the matter was continued until this date.

And now the Board being fully advised in regard to the matter, makes its finding and order as follows:

The Board finds and determines from the evidence that the Missouri Insurance Company is, and at all the times hereinafter mentioned was an insurance company organized and existing under the laws of the State of Missouri, having its principal office and place of business in the City of St. Louis, Missouri; that a blank form for tax return for state, city and school taxes for the year 1926 was duly served by the Assessor of the City of St. Louis, Missouri, upon said Missouri Insurance Company, and that said company, in due and proper time, prepared and attached to [fol. 16] said blank, and delivered to the Assessor of the City of St. Louis, under oath, its tax return or list, which said tax return or list set forth the value of its real estate as of June 1, 1925, as $142,000.00, and the gross value of its assets other than real estate at $448,265.33.

The Board further finds that on June 1, 1925, said Missouri Insurance Company had money deposited in bank

or other safe place in the amount of $5,265.33, and solvent bonds, whether State, county, town, city, township, incorporated or unincorporated companies, valued by it at $349,000.00; and that the remaining assets of the said company owned or held by it on said date are not taxable because of their nature or because of their location outside of the State.

The Board further finds that the said Missouri Insurance Company has claimed, in its return for taxation, and still claims, that under the provisions of Section 6386 of the Revised Statutes of Missouri, 1919, it is entitled to deduct from its taxable assets its legally required reserve necessary to reinsure its outstanding risks and any unpaid policy claims as of June 1, 1925, and that the amount of these deductions is $326,522.69 on account of its legally required reserve, and $6,964.00 on account of unpaid policy claims, and that the net value of its property subject to taxation in excess of its legally required reserve and any unpaid policy claims is $30,778.64.

The Board further finds that the legally required reserve of the Missouri Insurance Company, on June 1, 1925, did in fact amount to $326,522.69, and that its unpaid policy claims did in fact amount to $6,964.00.

The Board rejects the claim of the said Missouri Insurance Company to deduct its legally required reserve aforesaid and its unpaid policy claims aforesaid because, under the provisions of Section 12775 of the Revised Statutes of Missouri, 1919, the property of the said Company is subject to taxation unreservedly, and the Constitution and laws of Missouri require that all property subject to taxation shall be taxed in proportion to its value.

This Board is advised by the City Counselor of the City of St. Louis that Section 6386 of the Revised Statutes of Missouri, 1919, upon which the said Missouri Insurance Company bases its estimate of its taxable property, is in conflict with Section 4 of Article X of the Constitution of Missouri, and is null and void.

The Board further finds that the said Missouri Insurance Company, on June 1, 1925, owned or held in the State of Missouri, money deposited in bank or other safe place, amounting to $5,265.33, and solvent bonds, whether State,

county, town, city, township, incorporated or unincorporated companies, which the Board values at $44,750.00.

Accordingly, the Board of Equalization of the City of St. Louis, on the motion of Mr. Schollmeyer, seconded by Mr. Luechtefeld, and unanimously adopted, hereby assessed the money deposited in bank or other safe place of the said Missouri Insurance Company for the taxes of 1926, at $5,250.00, and solvent bonds, whether State, County, town, city, township, incorporated or unincorporated companies, at $44,750.00, and fixes the total assessment of personal property owned or held by the said Missouri Insurance Company, on June 1, 1925, at $50,000.00.

The said Missouri Insurance Company, having entered its protest, through its attorneys, to the action of the Board [fol. 17] in making the assessment of its property as aforesaid for the taxes of 1926, without allowing any deduction on account of its legally required reserve necessary to reinsure its outstanding risks or on account of any unpaid policy claims, it is hereby ordered that its protest be made part of this record.

(3) In view of the difference between the facts in this case and those in the other cases recently pending before the Court, notwithstanding the former stipulation herein, the parties now agree that this cause may be submitted to the Court upon the pleadings and the record as herein stipulated.

Dated this 7th day of December, 1928.

(Signed) Jones, Hocker, Sullivan & Angert, Ralph T. Finley, Attorneys for Relator. Julius T. Muench, City Counselor; Oliver Senti, Associate City Counsellor, Attorneys for Respondent.

[fol. 18] In Supreme Court of Missouri, en Banc

[Title omitted]

Abstract of Record for Relator—Filed Dec. 24, 1928

This is an original proceeding by certiorari. After due notice thereof to the respondents, the relator filed its peti-

tion for a writ of certiorari in this court on September 17, 1926. The respondents are Frederick Gehner, as Assessor of the City of St. Louis and President of the Board of [fol. 19] Equalization of the City of St. Louis, and other members of the Board of Equalization of said City.

A writ of certiorari was granted by this Court on September 29, 1926.

The relator's petition or application for a writ of certiorari is as follows:

[fols. 20-23] Petition for writ of certiorari omitted; printed side page 2 ante.

[fol. 24] And thereafter, in lieu of a formal return by the respondents herein, the parties, by their respective attorneys, have entered into the following stipulation as to the facts and record in the case (omitting capition):

[fols. 25-30] Stipulated record omitted; printed side page 12 ante.

[fol. 31] And thereafter, the relator filed its motion for a judgment quashing the record of the respondents herein, which motion (omitting caption) is as follows:

[fol. 32] Motion for Judgment Quashing Record

Now comes the relator and moves the Court to quash the record of the Assessor of the City of St. Louis and the Board of Equalization of said city, shown by the stipulated record in this cause, and for grounds of said motion states:

1. That the assessment and proposed tax against the relator herein is unauthorized by law.

2. That upon the face of the record in determining the amount of relator's assessable property the respondents erroneously failed to allow deductions for the amount of the legally required reserve necessary to reinsure the relator's outstanding risks and unpaid death claims as of June 1, 1925.

3. That the respondents erroneously acted on the assumption that Section 6386, Revised Statutes of Missouri 1919, is unconstitutional and void.

4. Upon the face of the record and upon the findings of fact by the board the legally required reserve alone, on June 1, 1925, deposited with the State of Missouri, amounted to $1,498,721.00, which was in excess of the total amount of personal property owned by the relator on June 1, 1925, by reason whereof no assessment could be legally made against the relator.

Wherefore, the relator prays for the judgment of this Court ordering that the assessment against the relator, as made by the respondents, be set aside and for naught held, and that the record of said respondents authorizing and [fols. 33-34a] fixing said assessment be quashed and for all other proper relief in the premises.

Jones, Hocker, Sullivan & Angert, Ralph T. Finley,
Attorneys for Relator.

The foregoing is submitted by the relator as and for an abstract of record in this cause.

Jones, Hocker, Sullivan & Angert, Ralph T. Finley,
Attorneys for Relator.

[fol. 35] In Supreme Court of Missouri, en Banc

[Title omitted]

Certiorari

Opinion

Relator is a life insurance company organized under the laws of this State. By this proceeding it seeks to have quashed the record of the Board of Equalization of the City of St. Louis, raising the value of its taxable assets, other than real estate, from $20,778.64 to $50,000. Relator's return of its property for taxation disclosed that its gross personal assets amounted to $448,265.32, consisting of taxable assets in the sum of $354,265.33 and non-taxable assets (United States Bonds) in the sum of $94,000; and that its total liabilities, the legal reserve and unpaid policy claims, aggregated the sum of $333,486.69. Its method of determining the net value of its assets for taxation under

Section 6386, R. S. 1919, as appears from its return, was to deduct from the gross personal assets the aggregate of all liabilities and from that net value deduct the value of its non-taxable assets; in other words, it first took out of its gross assets all non-taxable assets and then from the remaining taxable assets it deducted the whole of its liabilities. The Board of Equalization, being of the opinion that said Section 6386 was unconstitutional, somewhat arbitrarily assessed relator's personal property at $50,000.

Section 6386 relates to the taxation of domestic insurance [fol. 36] companies. With reference to every such company it provides that the next value of all its personal assets, or assets, or values, in excess of the legally required reserve necessary to re-insure its outstanding risks and unpaid policy claims, shall be assessed and taxed as the property of individuals. The Section of course deals only with property which is subject to taxation. The question in this case is: How shall the net value of the taxable assets be determined? Relator claims, inferentially, that it has invested its surplus in United States Bonds, non-taxable assets, and that it has put its legal reserve and working capital into other securities, which are subject to taxation; and that therefore the reserve and all other liabilities should be deducted from the taxable assets alone. But surplus, earnings, undivided profits, etc., are mere bookkeeping terms. The legal reserve is not a segregated fund; it is a measure of liability, a test of solvency; the amount that would be required to make a present settlement with all of relator's policy holders, or to re-insure its risks it is an indebtedness. (State ex rel Missouri State Life Insurance Co. v. Gehner, 8 S. W. (2d) 1068, 1072.) And relator's indebtedness, legal reserve and unpaid policy claims, is a charge against all of its assets, both taxable and non-taxable.

To put the question concretely: relator's non-taxable assets amount to $94,000, its taxable assets to $354,265.33, both are subject to liabilities aggregating $333,486.69—what is the net value of the taxable assets under Section 6386? We know of no more equitable way to determine such value than that of apportioning the total liability between the two classes of assets according to their respective amounts and then deducting from the taxable assets the liability so apportioned to that class. The taxable as-

sets are approximately 79.03 per cent of the gross assets; 79.03 per cent of the aggregate liability is in dollars and [fol. 37] cents $263,554.53; that sum deducted from the gross value in money of the taxable assets leaves $90,710.80, their net value. As this sum is greater than that at which relator's personal property was assessed by the Board of Equalization its record should not be quashed. (State ex rel. American Automobile Insurance Company v. Gehner, 8 S. W., (2d) 1057).

Our writ is accordingly quashed and the proceedings dismissed.

All concur.

William T. Ragland, J.

[fol. 38] In the Supreme Court of Missouri, en Banc

[Title omitted]

Certiorari

Modified Opinion—Filed Mar. 27, 1929

Relator is a life insurance company organized under the laws of this State. By this proceeding it seeks to have quashed the record of the Board of Equalization of the City of St. Louis, raising the value of its taxable assets, other than real estate, from $20,778.64 to $50,000. Relator's return of its property for taxation disclosed that its gross personal assets amounted to $448,265.32, consisting of taxable assets in the sum of $354,265.33 and non-taxable assets (United States Bonds) in the sum of $94,000; and that its total liabilities, the legal reserve and unpaid policy claims, aggregated the sum of $333,486.69. Its method of determining the net value of its assets for taxation under Section 6386, R. S. 1919, as appears from its return, was to deduct from the gross personal assets the aggregate of all liabilities and from that net value deduct the value of its non-taxable assets; in other words, it first took out of its gross assets all non-taxable assets and then from the remaining taxable assets it deducted the whole of its liabili- [fol. 39] ties. The Board of Equalization, being of the opinion that said Section 6386 was unconstitutional, some-

what arbitrarily assessed relator's personal property at $50,000.

Section 6386 relates to the taxation of domestic insurance companies. With reference to every such company it provides that the net value of all its personal assets, or assets, or values, in excess of the legally required reserve necessary to re-insure its outstanding risks and unpaid policy claims, shall be assessed and taxed as the property of individuals. The Section of course deals only with property which is subject to taxation. The question in this case is: How shall the net value of the taxable assets be determined? Relator claims, inferentially, that it has invested its surplus in United States bonds, non-taxable assets, and that it has put its legal reserve and working capital into other securities, which are subject to taxation; and that therefore the reserve and all other liabilities should be deducted from the taxable assets alone. But surplus, earnings, undivided profits, etc., are mere bookkeeping terms. The legal reserve is not a segregated fund; it is a measure of liability, a test of solvency; the amount that would be required to make a present settlement with all of relator's policy holders, or to re-insure its risks; it is an indebtedness. [State ex rel Missouri State Life Insurance Co. v. Gehner, 8 S. W. (2d), 1068, 1072.] And relator's indebtedness, legal reserve and unpaid policy claims, is a charge against all of its assets, both taxable and non-taxable.

To put the question concretely: relator's non-taxable assets amount to $94,000, its taxable assets to $590,265.33 (real, $142,000; personal, $354,265.33), both are subject to liabilities aggregating $333,486.69—what is the net value of the taxable personal assets under Section 6386? We know of no more equitable way to determine such value than that of apportioning the total liability between the two classes of assets (the taxable and the non-taxable) according to their respective amounts and then deducting from the taxable assets the liability so apportioned to that class. The [fol. 40] taxable assets are approximately 84 per cent of the gross assets; 84 per cent of the aggregate liability is in dollars and cents $280,128.81; that sum deducted from the gross value in money of the taxable personal assets ($354,265.33) leaves $74,136.52, their net value. As this

sum is greater than that at which relator's personal property was assessed by the Board of Equalization, its record should not be quashed. [State ex rel American Automobile Insurance Company v. Gehner, 8 S. W. (2d) 1057.] Our writ is accordingly quashed and the proceeding dismissed. All concur.

William T. Ragland, J.

[fol. 41] IN SUPREME COURT OF MISSOURI

No. 27549

STATE OF MISSOURI at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator,

vs.

FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. Schollmeyer, Clyde Carson, William L. Heckmann, and Joseph J. Lichtenfeld, as Members of the Board of Equalization of the City of St. Louis, Respondents

Certiorari

JUDGMENT—Feb. 11, 1929

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the writ of certiorari heretofore issued herein be, and the same is hereby quashed and for naught held and the proceedings dismissed, and that the said respondents recover against the said relator their costs and charges herein expended and have therefor execution.

(Opinion filed.)

[fols. 42-61] Petition for rehearing, covering 20 pages, filed February 20, 1929, omitted from this print. It was denied by order March 27, 1929.

[fol. 62] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER DENYING REHEARING—Mar. 27, 1929

Now, at this day, the Court having seen and fully considered relator's motion for a rehearing, doth order that said motion be and the same is hereby overruled. It is further considered and ordered by the court that the opinion heretofore rendered herein be and the same is hereby modified and the opinion, as modified, be refiled.

[fol. 63] IN SUPREME COURT OF MISSOURI

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed June 24, 1929

PETITION FOR APPEAL

The Petition of Missouri Insurance Company, a corporation, respectfully represents:

That the said Missouri Insurance Company is, and was at all times herein mentioned, a life insurance company organized and existing under the laws of the State of Missouri, having its principal office in the City of St. Louis, Missouri, and at all times engaged in such business in said State of Missouri; that the respondent, Frederick Gehner, is and was at all times herein mentioned the duly elected, qualified and acting Assessor of the City of St. Louis, Missouri, and, as such, head of the Assessment Division [fol. 64] established by the Charter of said City, and President of the Board of Equalization of said City, and that the respondents, A. R. Schollmeyer, Clyde Carson, William L. Heckmann and Joseph J. Lichenfeld, with the said Frederick Gehner, composed the Board of Equalization of said City by due appointment of the Mayor thereof; that said Frederick Gehner, as such Assessor, and as President of the Board of Equalization, as aforesaid, is and was at all times herein mentioned the official custodian of all the

records, documents and files of the Assessor's office of the City of St. Louis, and also of the Board of Equalization of said City; that subsequent to June 1, 1925, and as of date June 1, 1925, as required by law, the relator made its tax return in due form to the Assessor of the City of St. Louis, aforesaid, of all of its property for taxation; that in said return, and as a basis for arriving at the taxable value of its property, the relator set down its personal property as follows, to wit:

Money deposited in bank or other safe place		$5,265.33
Bonds, whether State, County, Town, City, Township, incorporated or unincorporated companies, of the value of	$255,000.00	
Government bonds	94,000.00	
		349,000.00
Total personal assets subject to taxation in the State of Missouri		$354,265.33

The relator's said return also showed deductions claimed by it under the provisions of Revised Statutes of Missouri, 1919, Section 6386, as follows:

Amount of legally required reserve necessary to reinsure its outstanding risks on June 1, 1925, deposited with the State of Missouri for the protection of policy holders	$326,522.60
Amount of unpaid policy claims, June 1, 1925.	6,964.00
Total deductions	$333,486.69

[fol. 65] That on the face of said return and the facts therein stated, the net amount of relator's personal property subject to taxation on June 1, 1925, was $20,778.64; that notwithstanding said facts, the respondents, acting as the Board of Equalization of the City of St. Louis, Missouri, did, on March 31, 1926, duly notify the relator of the intention of said Board to assess the relator for personal taxes for the year 1926, on the return of relator as of June 1, 1925, as follows:

Cash deposited in bank or other safe place	$5,260.00
Solvent bonds	349,000.00

and by said notice required the relator to appear before said Board at a time stated, and show cause why such assessment should not be made.

That thereafter, in conformity to said notice, the relator, by its officers and attorneys, appeared before said Board and a hearing was had under said notice; that upon said hearing said Board made its findings in accordance with the facts stated in said return, but said Board also found and determined that, notwithstanding the legally required reserve and unpaid policy claims amounted to $333,486.69, the relator was not entitled to deduct said sum from its assets amounting to $354,265.33, because, in the opinion of said Board, based upon the advice of the City Counsellor of the City of St. Louis, Section 6386 of the Revised Statutes of Missouri, 1919, under which the relator sought to deduct said legal reserve, was unconstitutional and in contravention of Article X, Sections 3, 4, and 7 of the Constitution of the State of Missouri requiring uniformity of [fol. 66] taxation, and said Board thereupon arbitrarily fixed the amount of relator's net taxable personal property at the sum of $50,000.00.

And thereafter the relator in the above entitled cause instituted an original proceeding by certiorari in the Supreme Court of the State of Missouri, in the above entitled cause, and obtained a writ of certiorari against the respondents. In due time said cause came on for hearing before the Supreme Court of the State of Missouri, in banc, and after said Court had in other cases determined that said Section 6386, R. S. of Mo. 1919, was not unconstitutional, and that deductions by life insurance companies, as claimed by the relator, were valid. [State ex rel. Missouri State Life Ins. Co. vs. Gehner, City Assessor, et al., 8 S. W. (2d) 1068; State ex rel. Central States Life Ins. Co. vs. Gehner, City Assessor, et al., 8 S. W. (2d) 1073; State ex rel. Indemnity Co. of America vs. Gehner, City Assessor, et al., 8 S. W. (2d) 1067.]

On consideration of said cause said Supreme Court of Missouri, at the October Term, 1928 of said Court, entered its opinion sustaining the assessment by the respondents in the sum of $50,000.00, not upon the theory that Section 6386, R. S. 1919 was unconstitutional, but on the theory that since the relator owned United States Government bonds in the sum of $94,000.00, and taxable assets in the

sum of $354,265.33, both of which were subject to liabilities (legal reserve) aggregating $333,486.69, the net taxable assets should be determined by apportioning the total liability [fol. 67] (legal reserve) between the two classes of assets, according to their respective amounts, and then deducting from the taxable assets the liability so apportioned to that class, by which calculation the Court computed the net taxable assets of relator as 79.03% of the legal reserve and the value in money of said taxable assets as $90,719.80.

In due time the relator filed its motion for a rehearing in said cause before said Supreme Court. Said cause being an original proceeding in said Supreme Court, said motion for rehearing was in the nature of a motion for new trial. Prior to the handing down of said opinion neither the Board of Equalization nor said Supreme Court by any preliminary or prior ruling had suggested any construction or application of Section 6386 R. S. of Mo. 1919, which would contravene any provisions of the Federal Constitution or statutes or any decisions of the Supreme Court of the United States, so that upon the filing of said motion for rehearing there was presented to the relator its first opportunity to raise the federal questions herein mentioned. In its said opinion the Supreme Court of Missouri for the first time construed said Section 6386 as authorizing the apportionment of the legal reserve of domestic insurance companies between taxable and non-taxable assets, and for that purpose including in relator's gross assets its non-taxable assets (in this case United States Government Bonds to the amount of $94,000.00) in calculating its net taxable assets under said Section 6386.

In its said motion for rehearing, therefore, the relator at the first opportunity set up the following federal ques- [fol. 68] tions, on account of which it attacked said opinion and asked that a rehearing be granted in said cause, to-wit:

1. That said Supreme Court by its opinion refused to permit the relator to deduct the full amount of its reserve because it owned United States Government Bonds in the sum of $94,000.00, whereas domestic insurance companies having no Government Bonds might deduct the full amount of the legal reserve authorized by said Section 6386, and

that by such construction and application of Section 6386 the Court contravened Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that no State shall make or enforce any law which shall deprive any person of property without due process of law, or deny to any person the equal protection of the laws. Unled said point of said motion it was contended that the opinion deprived the relator of its property without due process of law because its taxes were increased beyond the plain terms of the statute by the failure to deduct the full amount of its reserve, and that it deprived the relator of the equal protection of the laws because, on account of the mere circumstance that the relator owned exempt securities, a percentage of its reserve was held to be not deductible, whereas other domestic insurance companies having no Government Bonds would be permitted to deduct the full amount of such reserve.

2. That the effect of the opinion is to hold that Section 6386 R. S. of Mo. 1919 authorizes the full deduction of the reserve in case of domestic life insurance companies having no non-taxable assets, but requires that in case of relator [fol. 69] and other companies owning non-taxable securities, only a proportionate part of the reserve may be deducted, thereby rendering said Section 6386 unconstitutional in that it would deprive the relator of its property without due process of law, and would deny to the relator the equal protection of the laws, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

3. That the method of calculating the relator's net taxable assets by including in its gross assets its Government Bonds resulted in the taxation of a portion of relator's tax-exempt Government securities, under which point the relator cited the following cases:

Farmers Bank vs. Minnesota, 232 U. S. 516;

Northwestern Mutual Life Ins. Co. vs. Wisconsin, 275 U. S. 136;

National Life Ins. Co. vs. United States, 277 U. S. 508;

State ex rel. American Automobile Ins. Co. vs. Schramm, 271 Mo. 223.

4. That the inclusion of the relator's non-taxable assets in its gross assets, for the purpose of determining its net taxable assets under Section 6386, amounted to the taxation of at least a portion of its Government Bonds, in violation of the provision of the Constitution of the United States (Section 8 of Article I) giving Congress power to borrow money on the credit of the United States, on which proposition the relator cited the following cases:

McCulloch vs. Maryland, 4 Wheat. 316;
Weston vs. City Council of Charleston, 2 Pet. 448;
Farmers Bank vs. Minnesota, 232 U. S. 516;
Northwestern Mutual Life Ins. Co. vs. Wisconsin, 275 U. S. 136.

[fol. 70] 5. That the inclusion of relator's non-taxable securities in its gross assets in arriving at its net taxable assets as set forth in the opinion was in direct contravention and in violation of the express provisions of Sections 6481, 6816 and 6825, U. S. Comp. Stat. 1918, denying States and Municipalities power to tax Government Bonds.

The petitioner further states that thereafter, on March 27, 1929, the said Supreme Court duly considered said motion for rehearing and modified its opinion by calculating the taxable assets as 84% of the gross assets and the value in money of such net taxable assets as $74,136.52, and thereupon filed such modified opinion and overruled said motion for rehearing. The pertinent portion of such modified opinion is as follows:

"Section 6386 relates to the taxation of domestic insurance companies. With reference to every such company it provides that the net value of all its personal assets, or assets, or values, in excess of the legally required reserve necessary to re-insure its outstanding risks and unpaid policy claims, shall be assessed and taxed as the property of individuals. The Section of course deals only with property which is subject to taxation. The question in this case is: How shall the net value of the taxable assets be determined? Relator claims, inferentially, that it has invested its surplus in United States Bonds, non-taxable assets, and that it has put its legal reserve and working capital into other securities, which are subject to taxation; and

that therefore the reserve and all other liabilities should be deducted from the taxable assets alone. But surplus, earnings, undivided profits, etc., are mere bookkeeping terms. The legal reserve is not a segregated fund: it is a measure of liability, a test of solvency: the amount that would be required to make a present settlement with all of relator's policyholders, or to re-insure its risks: it is an indebtedness. [State ex rel. Missouri State Life Insurance Co. v. Gehner, 8 S. W. (2d) 1068, 1072.] And relators' indebtedness, legal [fol. 71] reserve and unpaid policy claims, is a charge against all of its assets, both taxable and non-taxable.

"To put the question concretely: relator's non-taxable assets amount to $94,000, its taxable assets to $590,265.33 (real, $142,000; personal, $354,265.33), both are subject to liabilities aggregating $333,486.69—what is the net value of the taxable personal assets under Section 6386? We know of no more equitable way to determine such value than that of apportioning the total liability between the two classes of assets (the taxable and the non-taxable) according to their respective amounts and then deducting from the taxable assets the liability so apportioned to that class. The taxable assets are approximately 84 per cent of the gross assets; 84 per cent of the aggregate liability is in dollars and cents $280,128.81; that sum deducted from the gross value in money of the taxable personal assets ($354,265.33) leaves $74,136.52, their net value. As this sum is greater than that at which relator's personal property was assessed by the Board of Equalization, its record should not be quashed. [State ex rel. American Automobile Insurance Company v. Gehner, 8 S. W. (2d) 1057.] Our writ is accordingly quashed and the proceeding dismissed."

The petitioner further states that on said March 27, 1929 said Supreme Court, upon the filing of said modified opinion, entered its order quashing said writ of certiorari issued in said cause and dismissed said proceeding, which constitutes a final judgment in said cause against which the relator has no further remedy in said Supreme Court of Missouri; and that by its opinion and judgment, aforesaid, and the overruling of relator's said motion for rehearing, said Supreme Court of Missouri necessarily determined the federal questions set forth by relator in its said motion

for rehearing, contrary to the contentions of relator, as aforesaid.

And the petitioner further states that in the aforesaid judgment and proceedings certain errors were committed, to the prejudice of the petitioner, relator in said cause, all of which will more fully appear from the assignment of [fol. 72] errors which is filed herewith.

Wherefore, considering itself aggrieved by the final decision of the Supreme Court of the State of Missouri in the above entitled cause, the relator therein, Missouri Insurance Company, hereby prays that an appeal be allowed herein to the Supreme Court of the United States, and for an order fixing the amount of the bond thereon.

In connection with the foregoing petition for appeal, and with respect to the aforesaid modified and final opinion and judgment of said Supreme Court of Missouri, the petitioner submits the following:

ASSIGNMENTS OF ERROR

I

By its opinion and judgment herein the Supreme Court of Missouri has erroneously construed Section 6386, R. S. of Mo. 1919, as authorizing the apportionment of the legal reserve between the taxable and non-taxable assets of relator, and for that purpose to include in relator's gross assets its Government Bonds in the sum of $94,000.00 for the purpose of calculating the net value of its taxable personal assets, thereby resulting in the taxation of at least a portion of relator's tax-exempt Government Bonds. In so far as the Supreme Court of Missouri so construed and applied Section 6386, said Section is made to authorize the taxation of relator's tax-exempt Government Bonds, in violation of the provision of the Constitution of the United States (Section 8 of Article I) giving Congress power to borrow money on the credit of the United States, as construed by numerous decisions of the Supreme Court of the United States.

[fol. 73]

II

The Supreme Court of Missouri, by its opinion and judgment herein, has held that Section 6386, R. S. of Mo.

1919, authorizes the apportionment of the legal reserve authorized to be deducted by said statute between the taxable and non-taxable assets of domestic insurance companies thereby discriminating against such insurance companies as might own Government Bonds, in contravention of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that no State shall make or enforce any law which shall deprive any person of property without due process of law, or deny to any person the equal protection of the laws. Such construction and application of Section 6386 by the Supreme Court of Missouri deprives relator of its property without due process of law, because its taxes are thereby increased beyond the plain terms of the statute by the failure to deduct the full amount of its reserve by reason of the mere circumstance that it owned Government Bonds, and such action of said Court deprives the relator of the equal protection of the laws because, on account of the mere circumstance that the relator owned exempt securities, a percentage of its reserve is held to be not deductible, whereas other domestic insurance companies having no Government Bonds would be permitted to deduct the full amount of such reserve.

III

The Supreme Court of Missouri erred in including in relator's gross assets its non-taxable securities in calculating [fol. 74] its net taxable assets because such inclusion necessarily resulted in the taxing of at least a portion of relator's Government Bonds in violation of the express provisions of U. S. Revised Statutes, Section 3701, Section 6816, U. S. Comp. Stat. 1918, denying States and Municipalities the power to tax Government Bonds, and contrary to numerous decisions of the Supreme Court of the United States.

IV

For the purpose of calculating relator's net taxable assets, the opinion and judgment of the Supreme Court of Missouri erroneously includes in the relator's gross assets its tax-exempt Government Bonds in the sum of $94,000.00, thereby resulting in the taxation of a portion of relator's said Government Bonds, or at least resulting in an un-

warranted and unlawful discrimination against domestic insurance companies owning Government Bonds, by subjecting relator and other companies owning Government Bonds to greater burdens of taxation upon taxable property because of the ownership of some that is tax exempt.

V

The Supreme Court of Missouri, by its method of calculating the next taxable assets of the relator, diminishes the amount of legal reserve deductible under Section 6386, R. S. of Mo. 1919 and thereby defeats the exemption guaranteed to owners of Government Bonds contrary to U. S. Revised Statutes, Section 3701, U. S. Comp. Stat. 1918, Section 6816, and Section 8, Article I of the Constitution of the United States, and contrary to numerous decisions of the Supreme Court of the United States.

[fol. 75] PRAYER FOR REVERSAL

For which errors the relator, Missouri Insurance Company, prays that the judgment of the Supreme Court of the State of Missouri in the above entitled cause, dated March 27, 1929, be reversed, and a judgment rendered in favor of appellant, State of Missouri at the relation of Missouri Insurance Company, and for costs.

Lou O. Hocker, Frank H. Sullivan, James C. Joue, Jr., James C. Joue, Ralph T. Finley, Counsel for Appellant.

Copy received June 24th, 1929.

Julius T. Muench, Oliver Smith, Counsel for Appellees.

[fol. 75½] [File endorsement omitted.]

[fol. 76] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 24, 1929.

The appellant in the above entitled cause having prayed for the allowance of an appeal in this cause to the Supreme

Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Missouri on the 27th day of March, 1929, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such cases made and provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Missouri in the [fol. 77] above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Missouri shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within thirty (30) days of this date.

And it is further ordered that the appeal bond herein, to act as a supersedeas, and for costs on appeal, be fixed in the sum of One Thousand Dollars ($1,000.00).

Dated this 24th day of June, 1929.

J. T. White, Chief Justice of the Supreme Court of the State of Missouri.

[fol. 77½] [File endorsement omitted.]

[fol. 78] Citation, in usual form, showing service on Julius T. Muench et al., filed June 24, 1929, omitted in printing.

[fols. 79 & 80] Supersedeas bond on appeal for $1,000 approved; omitted in printing.

[fol. 81] IN SUPREME COURT OF MISSOURI

[Title omitted]

PRÆCIPE FOR RECORD—Filed June 24, 1929

The Clerk of the Supreme Court of Missouri is hereby directed to prepare and certify a transcript of the record in

the above entitled cause for the use of the Supreme Court of the United States by including therein the following:

1. Order or record showing filing of petition for certiorari in the Supreme Court of Missouri.
2. Notice, petition for certiorari and suggestions in support of petition for certiorari, writ of certiorari and return of service thereon, and stipulated record, and Relator's Abstract of Record.
3. Original opinion of Supreme Court of Missouri.
4. Modified opinion of Supreme Court of Missouri.
5. Judgment of the Supreme Court of Missouri.
6. Entry showing filing of relator's motion for rehearing and relator's motion for rehearing.

[fol. 82] 7. Order of Supreme Court of Missouri overruling relator's motion for rehearing.

8. Petition for appeal, assignment of errors and prayer for reversal.
9. Order allowing appeal.
10. Original citation, with acknowledgment of service thereon.
11. Appeal bond.
12. Præcipe.

James C. Jones, Lou O. Hocker, Frank H. Sullivan, James C. Jones, Jr., Ralph T. Finley, Counsel for Appellant.

Service of copy of the foregoing præcipe is hereby acknowledged on this 24th day of June, 1929.

Julius T. Muench, City Counsellor; Oliver Senti, First Associate City Counsellor, Counsel for Appellees.

[fol. 82½] [File endorsement omitted.]

[fol. 83] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 84] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 8, 1929.

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

Point 1. That the Supreme Court of Missouri erred in construing Section 6386, Revised Statutes of Missouri, 1919, as authorizing the apportionment of the legal reserve between the taxable and non-taxable assets of the relator, and for that purpose including in relator's gross assets its Government Bonds in the sum of $94,000.00 in calculating the net value of its taxable personal assets, thereby resulting in the taxation of at least a portion of relator's tax-exempt Government Bonds. In so far as the Supreme Court of Missouri so construed and applied said Section 6386, [fol. 85] said Section is made to authorize the taxation of relator's tax-exempt Government Bonds, in violation of the provision of the Constitution of the United States (Section 9 of Article I) giving Congress power to borrow money on the credit of the United States, as construed by numerous decisions of the Supreme Court of the United States.

Point 2. The Supreme Court of Missouri erred in finding and holding that Section 6386, Revised Statutes of Missouri, 1919, authorizes the apportionment of the legal reserve allowed to be deducted by said statute between the taxable and non-taxable assets of domestic insurance companies, thereby discriminating against such insurance companies as might own Government Bonds, in contravention of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that no State shall make or enforce any law which shall deprive any person of property without due process of law, or deny to any person the equal protection of the laws. Such construction and application of Section 6386 by the Supreme Court of Missouri deprives the relator of its property without due process of law, because its taxes are thereby increased beyond the plain terms of the statute by the failure to deduct the full amount of its reserve by reason of the mere circumstance

that it owned Government Bonds, and such action of said Court deprives the relator of the equal protection of the laws because, on account of the mere circumstance that the relator owned exempt securities, a percentage of its reserve is held to be not deductible, whereas other domestic insurance companies having no Government Bonds would be permitted to deduct the full amount of such reserve.

[fol. 86] Point 3. The Supreme Court of Missouri erred in finding and holding that in calculating the net taxable assets of relator under Section 6386, Revised Statutes of Missouri, 1919, relator's non-taxable or exempt securities should be included in its gross assets, because to so hold would in effect result in taxing at least a portion of relator's Government Bonds, in violation of the express provisions of United States Revised Statutes, Section 3701, Section 6816, U. S. Comp. Stat. 1918, denying States and Municipalities the power to tax Government Bonds, and contrary to numerous decisions of the Supreme Court of the United States.

Point 4. For the purpose of calculating the relator's net taxable assets under the provisions of Section 6386, Revised Statutes of Missouri, 1919, the opinion of the Supreme Court of Missouri erroneously includes in the relator's gross assets its tax-exempt Government Bonds in the sum of $94,000.00, thereby resulting in the taxation of a portion of relator's said Government Bonds, and in an unwarranted and unlawful discrimination against domestic insurance companies owning Government Bonds, by subjecting relator and other companies owning Government Bonds to greater burdens of taxation upon taxable property because of the ownership of some that is tax exempt.

Point 5. The Supreme Court of Missouri, by its method of calculating the net taxable assets of the relator, erroneously diminishes the amount of legal reserve deductible under section 6386, Revised Statutes of Missouri, 1919, and indirectly, if not directly, defeats the exemption guaranteed to owners of Government Bonds, contrary to United States [fol. 87] Revised Statutes, Section 3701, U. S. Comp. Stat. 1918, Section 6816, and contrary to the provisions of Section 8 of Article I of the Constitution of the United States,

and numerous decisions of the Supreme Court of the United States.

The appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

Title of paper	Record page
Clerk's caption of transcript	1
Notice and application for writ of certiorari	1– 7
Writ of certiorari and acceptance of service thereon	10–11
Stipulated record	12–17
Abstract of record for relator	18–34
Original opinion of Supreme Court of Missouri	35–37
Entry of filing of motion for rehearing	41
Relator's motion for rehearing	42–61
Order overruling relator's motion for rehearing	62
Modified opinion of Supreme Court of Missouri	38–40
Judgment	41
Petition for appeal, assignments of error and prayer for reversal	63–75
[fols. 88 & 89] Order allowing appeal	76–77
Citation and entry of appearance thereon	78
Appeal bond	79–80
Præcipe	81–82
Certificate of Clerk of the Supreme Court of Missouri	83

James C. Jones, Lou O. Hocker, Frank H. Sullivan, James C. Jones, Jr., Ralph A. Finley, Counsel for Appellant.

Service of the foregoing statement of points relied upon and designation of parts of the record to be printed is hereby acknowledged on this 5th day of July, 1929.

Julius T. Muench, City Counsellor of the City of St. Louis; Oliver Senti, First Associate City Counsellor of the City of St. Louis, Counsel for Appellees.

[fol. 90] [File endorsement omitted.]

Endorsed on cover: File No. 34,353. Missouri Supreme Court. Term No. 222. State of Missouri at the relation of Missouri Insurance Company, appellant, vs. Frederick Gehner, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis, et al., etc. Filed July 8, 1929. File No. 34,353.

FILE COPY

AUG 5 1

CHARLES ELMOR

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator, Appellant,

vs.

FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis, A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis, Appellees.

No. 222.

STATEMENT AS TO JURISDICTION ON APPEAL.

JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
JAMES C. JONES, JR.,
RALPH T. FINLEY,
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St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator, Appellant, vs. FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis, A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis, Appellees.	No. 222.

STATEMENT AS TO JURISDICTION ON APPEAL.

May It Please the Court:

The appellant, in support of the jurisdiction of this Court to review the above-entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

Section 237 of the Judicial Code as amended, being Section 344, Title 28, U. S. Code Ann., provides:

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn the question of validity of the statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Section 861a, Title 28, U. S. Code Ann., Act of Jan. 31, 1928, Ch. 14, 45 Stat., is as follows:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

Section 861b, Title 28, U. S. Code Ann., Act of Jan. 31, 1928, Ch. 14, Sec. 2, 45 Stat. as amended by Act of Apr. 26, 1928, Ch. 440, 45 Stat., provides:

"The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was originally entered on February 11, 1929 (Tr., pp. 35, 41[1]).

Thereafter, on February 20, 1929, within the time allowed by Rule 21 of the Supreme Court of Missouri, the appellant, relator below, filed its motion for a rehearing in said court (Tr., p. 41).

Thereafter, after consideration of said motion for rehearing, on March 27, 1929, the Supreme Court of Missouri overruled said motion for rehearing and modified its opinion in said cause (Tr., p. 62).

The petition for appeal herein was presented to the Chief Justice of the Supreme Court of Missouri on June 24, 1929, within three months after the date of the overruling of relator's motion for rehearing, and the appeal was allowed on said June 24, 1929 (Tr., pp. 76-77).

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[1]All references to the record are to the pages of the certified, unprinted transcript or record prepared by the Clerk of the Supreme Court of Missouri, on file with the Clerk of the Supreme Court of the United States. The record has not yet been printed.

C.

Nature of Case and Ruling Below.

Section 6386, Revised Statutes of Missouri, 1919, is construed and applied by the original opinion of the Supreme Court of Missouri, as well as by the modified opinion in this case (Tr., pp. 35, 38). Said section 6386, so far as pertinent, is as follows:

> "Sec. 6386. **Home Companies Subject to What Tax.** —The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals."

By its opinion the Supreme Court of Missouri, after referring to the provisions of Section 6386, R. S. of Mo. 1919, states:

> "The question in this case is: How shall the net value of the taxable assets be determined? * * * We know of no more equitable way to determine such

value than that of apportioning the total liability between the two classes of assets (the taxable and the nontaxable) according to their respective amounts and then deducting from the taxable assets the liabilities so apportioned to that class'' (Tr., pp. 35-37, 38-40).

The Supreme Court of Missouri then calculates the net taxable assets of relator by including in its gross assets the sum of $94,000.00, representing United States Government bonds owned by it, thus resulting in a net value of relator's assets amounting to $74,136.52, instead of $20,-778.64, which would have been the result if the relator were permitted to deduct its Government bonds and also to deduct the reserve, as provided in section 6386.

By its motion for rehearing the relator contended that the Supreme Court of Missouri erroneously included the amount of relator's Government bonds in its gross assets in calculating the net taxable value of its personal property, and that the decision and opinion of the Supreme Court of Missouri was in violation of Section 9 of Article I of the Constitution of the United States, giving Congress power to borrow money on the credit of the United States, as construed by numerous decisions by the Supreme Court of the United States, and in contravention of the due-process and equal-protection clauses of Section 1, of Article XIV of the Amendments to the Constitution of the United States. By its motion for rehearing the relator also contended that the construction of Section 6386,

R. S. of Mo. 1919, by the Supreme Court of Missouri was in violation of the express provisions of U. S. Rev. Stat., Sec. 3701, Sec. 68, 16 U. S. Comp. Stat. 1918, denying states and municipalities the power to tax Government bonds (Tr., pp. 42-61). In other words, it was contended by relator that the construction and application of section 6386 by the Supreme Court of Missouri, as applied to domestic insurance companies owning Government bonds, made such section repugnant to the constitutional provisions aforesaid, and to the statute of the United States exempting Government bonds from taxation. And the Supreme Court of Missouri was particularly cited to the principles set forth in the following decisions of the Supreme Court of the United States on similar questions:

Farmers Bank v. Minnesota, 232 U. S. 516;
Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136;
National Life Ins. Co. v. United States, 277 U. S. 508;
Miller v. Milwaukee, 272 U. S. 713;
Supervisors v. Stanley, 105 U. S. 305;
McCulloch v. Maryland, 4 Wheat. 316;
Weston v. Charleston, 2 Pet. 448.

D.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Great Northern Ry. Co. v. Minnesota, 278 U. S. 503, 49 S. Ct. R. 191;

To be attached to page 7 of Appellant's Statement as to Jurisdiction in case No. 222.

The record shows immunity of U. S. Bonds was asserted throughout proceedings (R. 7-8, 11, 15, 17) and constitutional questions raised at the first opportunity.

Merchant's National Bank vs. National Bank, 202 U. S. 295, 299;
C. B. & Q. R. R. Co. vs. Chicago, 166 U. S. l. c. 230-231;
Erie R. R. Co. vs. Purdy, 185 U. S. l. c. 153-154;
Grannis vs. Ordeau, 234 U. S. l. c. 392;
Saunders vs. Shaw, 244 U. S. 317.

The Missouri Court's opinion expressly recognizes the claim of exemption of such bonds and denies the claim on the ground and on account of its theory as to the construction of Sec. 6386 (R. 15).

Sullivan v. Texas, 207 U. S. 416;
Cissna v. Tennessee, 246 U. S. 289;
M. K. & T. R. Co. vs. Elliott, 184 U. S. l. c. 534;
Saltaustall v. Saltaustall, 276 U. S. l. c. 267;
Arrowsmith vs. Harmarning, 118 U. S. 194;
Chicago Life Ins. Co. vs. Needles, 113 U. S. 574.

Nashville C. & St. L. Ry. v. White, 278 U. S. 456, 49 S. Ct. R. 189;

New York v. Zimmerman, 278 U. S. 63, 49 S. Ct. R. 61;

Fox River Paper Co. v. R. R. Com. of Wisconsin, 274 U. S. 651, 47 S. Ct. R. 669;

Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 47 S. Ct. R. 179.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code, as amended, by Sections 344, 861a and 861b, U. S. Code Ann., Acts of January 31, 1928, and April 26, 1928, above cited.

Respectfully submitted,

JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
JAMES C. JONES, JR.,
RALPH T. FINLEY,
Counsel for Appellant.

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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

State of Missouri, at the Relation of Missouri Insurance Company, a Corporation, Relator,
Appellant,

vs.

Frederick Gehner, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. Schollmeyer, Clyde Carson, William L. Heckmann and Joseph J. Lichtenfeld, as Members of the Board of Equalization of the City of St. Louis,
Appellees.

No. 222.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
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St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

State of Missouri, at the Relation of Missouri Insurance Company, a Corporation, Relator, Appellant, vs. Frederick Gehner, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. Schollmeyer, Clyde Carson, William L. Heckmann and Joseph J. Lichtenfeld, as Members of the Board of Equalization of the City of St. Louis, Appellees.	No. 222.

PETITION FOR WRIT OF CERTIORARI.

The petition of Missouri Insurance Company, a corporation, respectfully represents:

That the Missouri Insurance Company is and was at all times herein mentioned a life insurance company organized

and existing under the laws of the State of Missouri, having its principal office in the City of St. Louis, Missouri, and at all times engaged in such business in said State of Missouri; that the appellee, Frederick Gehner, is and was at all times mentioned herein the duly elected, qualified and acting Assessor of the City of St. Louis, Missouri, and as such head of the assessment division established by the Charter of said city, and President of the Board of Equalization of said city, and that the appellees, A. R. Schollmeyer, Clyde Carson, William L. Heckmann and Joseph J. Lichtenfeld, with the said Frederick Gehner, compose the Board of Equalization of said city by due appointment of the Mayor thereof; that said Frederick Gehner, as such Assessor, and as President of the Board of Equalization, as aforesaid, is and was at all times herein mentioned the official custodian of all the records, documents and files of the Assessor's office of the City of St. Louis, and also of the Board of Equalization of said city; that subsequent to June 1, 1925, and as of date June 1, 1925, as required by law, your petitioner made its tax return in due form to the Assessor of the City of St. Louis aforesaid, of all of its property for taxation; that in said return and as a basis for arriving at the taxable value of its property, your petitioner set down its personal property as follows, to wit:

Money deposited in bank or other safe place		$ 5,265.33
Bonds, whether state, county, town, city, township, incorporated or unincorporated companies of the value of	$255,000.00	
Government bonds	94,000.00	349,000.00
Total personal assets subject to taxation in the State of Missouri		$354,265.33

(Tr., pp. 12-17.)*

Your petitioner's said return also showed deductions claimed by it under the provisions of Revised Statutes of Missouri 1919, Section 6386, as follows:

Amount of legally required reserve necessary to reinsure its outstanding risks on June 1, 1925, deposited with the State of Missouri for the protection of policyholders	$326,522.60
Amount of unpaid policy claims June 1, 1925	6,964.00
Total deductions	$333,486.69

(Tr., pp. 12-17.)

That on the face of said return and the facts therein stated the net amount of your petitioner's personal property subject to taxation on June 1, 1925, was $20,778.64; that notwithstanding said facts the appellees, respondents below, acting as the Board of Equalization of the City of

*All references to the record are to the pages of the certified, unprinted transcript or record prepared by the Clerk of the Supreme Court of Missouri, on file with the Clerk of the Supreme Court of the United States. The record has not yet been printed.

St. Louis, Missouri, did, on March 31, 1926, duly notify your petitioner of the intention of said Board to assess your petitioner for personal taxes for the year 1926 on the return of your petitioner as of June 1, 1925, as follows:

Cash deposited in bank or other safe place	$ 5,260.00
Solvent bonds	349,000.00

and by said notice required your petitioner to appear before said Board at a time stated and show cause why such assessment should not be made.

That thereafter, in conformity to said notice, your petitioner, by its officers and attorneys, appeared before said Board and a hearing was had under said notice; that upon said hearing said Board made its findings in accordance with the facts stated in said return, but said Board also found and determined that, notwithstanding the legally required reserve and unpaid policy claims amounted to $333,486.69, your petitioner was not entitled to deduct said sum from its assets amounting to $354,265.33, because, in the opinion of said Board, based upon the advice of the City Counselor of the City of St. Louis, Section 6386 of the Revised Statutes of Missouri 1919, under which your petitioner sought to deduct said legal reserve, was unconstitutional and in contravention of Article X, Sections 3, 4 and 7 of the Constitution of the State of Missouri requiring uniformity of taxation, and said Board thereupon arbitrarily fixed the amount of your petitioner's

net taxable personal property at the sum of $50,000.00 (Tr., pp. 12-17).

And thereafter, your petitioner, the appellant in the above-entitled cause, relator below, instituted an original proceeding by certiorari in the Supreme Court of the State of Missouri in the above-entitled cause and obtained a writ of certiorari against the appellees (Tr., pp. 1-7). In due time said cause came on for hearing before the Supreme Court of the State of Missouri, in banc, and after said Court had in other cases determined that said Sec. 6386, R. S. Mo. 1919, was not unconstitutional, and that deductions by life insurance companies, as claimed by your petitioner, were valid (State ex rel. Missouri State Life Ins. Co. v. Gehner, City Assessor, et al., 8 S. W. [2d] 1068; State ex rel. Central States Life Ins. Co. v. Gehner, City Assessor, et al., 8 S. W. [2d] 1073; State ex rel. Indemnity Co. of America v. Gehner, City Assessor, et al., 8 S. W. [2d] 1067).

On consideration of said cause said Supreme Court of Missouri, at the October Term, 1928, of said court, entered its opinion sustaining the assessment by the appellees in the sum of $50,000.00, not upon the theory that Sec. 6386, R. S. of 1919, was unconstitutional, but on the theory that since your petitioner owned United States Government bonds in the sum of $94,000.00, and taxable assets in the sum of $354,265.33, both of which were subject to liabilities (legal reserve) aggregating $333,486.69, the net taxable assets should be determined by apportion-

ing the total liability (legal reserve) between the two classes of assets, according to their respective amounts, and then deducting from the taxable assets the liability so apportioned to that class, by which calculation the Court computed the net taxable assets of your petitioner as 79.03 per cent of the legal reserve and the value in money of said taxable assets as $90,710.80 (Tr., pp. 35-37).

In due time your petitioner filed its motion for a rehearing in said cause before said Supreme Court (Tr., p. 41). Said cause being an original proceeding in said Supreme Court said motion for rehearing was in the nature of a motion for new trial. Prior to the handing down of said opinion neither the Board of Equalization nor said Supreme Court by any preliminary or prior ruling had suggested any construction or application of Sec. 6386, R. S. of Mo. 1919, which would contravene any provisions of the Federal Constitution or statutes or any decisions of the Supreme Court of the United States, so that upon the filing of said motion for rehearing there was presented to your petitioner its first opportunity to raise the federal questions herein mentioned. In its said opinion the Supreme Court of Missouri for the first time construed section 6386 as authorizing the apportionment of the legal reserve of domestic insurance companies between taxable and nontaxable assets, and for that purpose including in your petitioner's gross assets its nontaxable assets (in this case United States Government

bonds to the amount of $94,000.00) in calculating its net taxable assets under said section 6386.

In its said motion for rehearing, therefore (Tr., pp. 42-61), your petitioner at the first opportunity set up the following federal questions on account of which it attacked said opinion and asked that a rehearing be granted in said cause, to wit:

1. That said Supreme Court, by its opinion, refused to permit your petitioner to deduct the full amount of its reserve because it owned United States Government bonds in the sum of $94,000.00, whereas domestic insurance companies having no Government bonds might deduct the full amount of the legal reserve authorized by said section 6386, and that by such construction and application of section 6386 the Court contravened Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that no state shall make or enforce any law which shall deprive any person of property without due process of law, or deny to any person the equal protection of the laws. Under said point of said motion it was contended that the opinion deprived your petitioner of its property without due process of law because its taxes were increased beyond the plain terms of the statute by the failure to deduct the full amount of its reserve, and that it deprived your petitioner of the equal protection of the laws because, on account of the mere circumstance that your petitioner owned exempt securities, a percentage of

its reserve was held to be not deductible, whereas other domestic insurance companies having no Government bonds would be permitted to deduct the full amount of such reserve.

2. That the effect of the opinion is to hold that Section 6386, R. S. of Mo. 1919, authorizes the full deduction of the reserve in case of domestic life insurance companies having no nontaxable assets, but requires that in case of your petitioner and other companies owning nontaxable securities, only a proportionate part of the reserve may be deducted, thereby rendering said section 6386 unconstitutional in that it would deprive your petitioner of its property without due process of law, and would deny to your petitioner the equal protection of the laws, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

3. That the method of calculating your petitioner's net taxable assets by including in its gross assets its Government bonds resulted in the taxation of a portion of your petitioner's tax-exempt Government securities, under which point your petitioner cited the following cases:

Farmers Bank v. Minnesota, 232 U. S. 516;
Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136;
National Life Ins. Co. v. United States, 277 U. S. 508;
State ex rel. American Automobile Ins. Co. v. Schramm, 271 Mo. 223.

4. That the inclusion of your petitioner's nontaxable assets in its gross assets, for the purpose of determining its net taxable assets under section 6386, amounted to the taxation of at least a portion of its Government bonds, in violation of the provision of the Constitution of the United States (Section 8 of Article I) giving Congress power to borrow money on the credit of the United States, on which proposition your petition cited the following cases:

McCulloch v. Maryland, 4 Wheat. 316;
Weston v. City Council of Charleston, 2 Pet. 448;
Farmers Bank v. Minnesota, 232 U. S. 516;
Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136.

5. That the inclusion of your petitioner's nontaxable securities in its gross assets in arriving at its net taxable assets as set forth in the opinion was in direct contravention and in violation of the express provisions of Sections 6471, 6816 and 6825, U. S. Comp. Stat. 1918, denying states and municipalities power to tax Government bonds.

Your petitioner further states that thereafter, on March 27, 1929, the said Supreme Court duly considered said motion for rehearing and modified its opinion by calculating the taxable assets as 84 per cent of the gross assets and the value in money of such net taxable assets as $74,136.52, and thereupon filed such modified opinion and overruled said motion for rehearing (Tr., pp. 38-40). The pertinent portion of such modified opinion is as follows:

"Section 6386 relates to the taxation of domestic insurance companies. With reference to every such company it provides that the net value of all its personal assets, or assets, or values, in excess of the legally required reserve necessary to reinsure its outstanding risks and unpaid policy claims shall be assessed and taxed as the property of individuals. The section of course deals only with property which is subject to taxation. The question in this case is: How shall the net value of the **taxable assets** be determined? Relator claims, inferentially, that it has invested its surplus in United States bonds, nontaxable assets, and that it has put its legal reserve and working capital into other securities which are subject to taxation, and that therefore the reserve and all other liabilities should be deducted from the taxable assets alone. But surplus, earnings, undivided profits, etc., are mere bookkeeping terms. The legal reserve is not a segregated fund; it is a measure of liability, a test of solvency; the amount that would be required to make a present settlement with all of relator's policyholders, or to reinsure its risks; it is an indebtedness (State ex rel. v. Missouri State Life Insurance Co. v. Gehner, 8 S. W. [2d], 1068, 1072). And relator's indebtedness, legal reserve and unpaid policy claims is a charge against all of its assets, both taxable and nontaxable.

"To put the question concretely: Relator's nontaxable assets amount to $94,000, its taxable assets to $590,265.33 (real, $142,000; personal, $354,265.33), both are subject to liabilities aggregating $333,486.69—what is the net value of the taxable personal assets under section 6386? We know of no more equitable way to determine such value than that of apportioning the

total liability between the two classes of assets (the taxable and the nontaxable) according to their respective amounts and then deducting from the taxable assets the liability so apportioned to that class. The taxable assets are approximately 84 per cent of the gross assets; 84 per cent of the aggregate liability is, in dollars and cents, $280,128.81; that sum deducted from the gross value in money of the taxable personal assets ($354,265.33) leaves $74,136.52, their net value. As this sum is greater than that at which relator's personal property was assessed by the Board of Equalization, its record should not be quashed (State ex rel. American Automobile Insurance Company v. Gehner, 8 S. W. [2d] 1057). Our writ is accordingly quashed and the proceeding dismissed."

Your petitioner further states that on said March 27, 1929, said Supreme Court of Missouri, upon the filing of said modified opinion, entered its order quashing said writ of certiorari issued in said cause and dismissed said proceeding, which constitutes a final judgment in said cause against which your petitioner has no further remedy in said Supreme Court of Missouri (Tr., p. 41), and that by its opinion and judgment aforesaid, and the overruling of your petitioner's said motion for rehearing, said Supreme Court of Missouri necessarily determined the federal questions set forth by your petitioner in its said motion for rehearing, contrary to the contentions of your petitioner, as aforesaid.

The final opinion of the Supreme Court of Missouri is reported in 15 S. W. (2d) 334, but is not yet reported in the official State Reports.

And your petitioner further states that in the aforesaid judgment and proceeding certain errors were committed, to the prejudice of your petitioner, relator in said cause, in the following particulars, to wit:

ASSIGNMENTS OF ERROR.

I.

The Supreme Court of Missouri erred in construing Section 6386, R. S. Mo. 1919, as authorizing the apportionment of the legal reserve between the taxable and non-taxable assets of your petitioner, and for that purpose including in your petitioner's gross assets its Government bonds in the sum of $94,000.00 in calculating the net value of its taxable personal assets, thereby resulting in the taxation of at least a portion of petitioner's said bonds, in violation of the provisions of the Constitution of the United States (Section 8 of Article I), giving Congress the right to borrow money on the credit of the United States, as construed by numerous decisions of the Supreme Court of the United States.

II.

The Supreme Court of Missouri erred in finding and holding that Section 6386, R. S. Mo. 1919, authorizes the

apportionment of the legal reserve, allowed to be deducted by said statute, between the taxable and nontaxable assets of domestic insurance companies, thereby discriminating against such insurance companies as might own Government bonds, in contravention of Section 1 of Article XIV of the Amendments to the Constitution of the United States, providing that no state shall make or enforce any law which will deprive any person of property without due process of law, or deny to any person equal protection of the laws. Such is true, because your petitioner's taxes are thereby increased beyond the plain terms of the statute (section 6386) by the failure to deduct the full amount of its reserve by reason of the mere circumstance that it owned tax-exempt Government bonds, and such action of said Court deprives your petitioner of the equal protection of the laws, because, on account of the mere circumstance that your petitioner owned exempt securities, a percentage of its reserve is held not to be deductible, whereas other domestic insurance companies having no Government bonds would be permitted to deduct the full amount of such reserve.

III.

The Supreme Court of Missouri erred in finding and holding that in calculating the net taxable assets of your petitioner under Section 6386, R. S. Mo. 1919, your petitioner's nontaxable or exempt securities should be included in its gross assets and the reserve apportioned between its

taxable and nontaxable assets, because to so hold would, in effect, result in taxing at least a portion of said Government bonds, in violation of the express provisions of United States Revised Statutes, Section 3701, United States Comp. Stat. 1918, Section 6816, denying states and municipalities the power to tax Government bonds, and contrary to numerous decisions of the Supreme Court of the United States.

IV.

The Supreme Court of Missouri erred in including in your petitioner's gross assets its tax-exempt Government bonds in the sum of $94,000.00, for the purpose of calculating its net taxable assets under the provisions of Section 6386, R. S. Mo. 1919, and in apportioning its reserve between its taxable and nontaxable assets, thereby resulting in the taxation of a portion of your petitioner's said Government bonds, and in an unwarranted and unlawful discrimination against your petitioner, a domestic insurance company owning Government bonds, by subjecting it to greater burdens of taxation upon taxable property because it owned some that is tax exempt.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, requiring and directing that Court, by and upon a date certain, to be designated therein, to certify and send to this Court, for review and determination, a full, true

and complete transcript of the record and proceedings in said Court in the case lately pending therein, numbered 27,549, and entitled, State of Missouri at the Relation of Missouri Insurance Company, a Corporation, v. Frederick Gehner, as Assessor of the City of St. Louis, and as President of the Board of Equalization of the City of St. Louis, A. R. Schollmeyer, Clyde Carson, William L. Hackmann and Joseph J. Lichtenfeld, as Members of the Board of Equalization of the City of St. Louis, Respondents, and that the said judgment of the Supreme Court of Missouri may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court shall seem just and proper.

And your petitioner will ever pray.

MISSOURI INSURANCE COMPANY,

By

JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
JAMES C. JONES, JR.,
RALPH T. FINLEY,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

State of Missouri, at the Relation of Missouri Insurance Company, a Corporation, Relator, Appellant, vs. Frederick Gehner, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. Schollmeyer, Clyde Carson, William L. Heckmann and Joseph J. Lichtenfeld, as Members of the Board of Equalization of the City of St. Louis, Appellees.	No. 222.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINIONS OF THE COURT BELOW.

The original opinion of the Supreme Court of Missouri in this case is shown on pages 35 and 37 of the transcript on appeal filed in this court.

The modified or final opinion of the Supreme Court of Missouri is reported as State of Missouri ex rel. Missouri

Ins. Co. v. Gehner, City Assessor, et al., 15 S. W. (2d) 334, and is also found at pages 38 to 40 of the transcript herein.

The case has not yet been published in the official state reports.

II.

JURISDICTION.

A. Statutory Provisions Sustaining Jurisdiction.

Paragraph (b) of Section 237 of the Judicial Code, as amended, Section 344, Title 28, United States Code Annotated, is as follows:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied. * * *
>
> "(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper

mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the Court or Judge by whom the writ of error was allowed."

Section 861 of Title 28, United States Code Annotated, is as follows:

"No court having power to review a judgment or decree of another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out; but where such error occurs the same shall be disregarded and the Court shall proceed as if in that regard its power to review were properly invoked (Sept. 6, 1916, c. 448, Sec. 4, 39 Stat. 727; Feb. 13, 1925, c. 229, Sec. 10, 43 Stat. 941)."

The Act of January 31, 1928, Chap. 14, Sec. 1, 45 Stat., being Sec. 861a, Title 28, United States Code Annotated, is as follows:

"The writ of error in cases, civil and criminal, is abolished. All the relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of January 31, 1928, Chap. 14, Sec. 2, 45 Stat., as amended April 26, 1928, Chap. 440, 45 Stat., being Sec.

861b, Title 28, United States Code Annotated, provides as follows:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B. Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was originally entered on February 11, 1929 (Tr., pp. 35, 41).

Thereafter, on February 20, 1929, within the time allowed by Rule 21 of the Supreme Court of Missouri, the appellant, relator below and petitioner herein for writ of certiorari, filed its motion for a rehearing in said court (Tr., p. 41).

Thereafter, after considering said motion for rehearing, on March 27, 1929, the Supreme Court of Missouri overruled said motion for rehearing and modified its opinion in said cause (Tr., p. 62).

The petition for appeal herein was presented to the Chief Justice of the Supreme Court of Missouri on June 24, 1929, within three months after the date of the overruling of relator's motion for rehearing, and the appeal was allowed on said June 24, 1929 (Tr., pp. 76-77).

And now, after the docketing of the appeal herein in this court, the appellant has filed a petition for certiorari on the papers on which the appeal was granted and the transcript herein.

C. Nature of Case and Ruling Below.

Section 6386, Revised Statutes of Missouri 1919, is construed and applied by the original opinion of the Supreme Court of Missouri, as well as by the modified opinion in this case (Tr., pp. 35, 38). Said section 6386, so far as pertinent, is as follows:

> "Sec. 6386. **Home Companies Subject to What Tax.** —The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals."

By its opinion, the Supreme Court of Missouri, after referring to the provisions of Section 6386, R. S. Mo. 1919, states:

> "The question in this case is: How shall the net value of the taxable assets be determined? • • • We

know of no more equitable way to determine such value than that of apportioning the total liability between the two classes of assets (the taxable and the nontaxable) according to their respective amounts and then deducting from the taxable assets the liabilities so apportioned to that class" (Tr., pp. 35-37, 38-40).

The Supreme Court of Missouri then calculates the net taxable assets of relator by including in its gross assets the sum of $94,000.00, representing United States Government bonds owned by it, thus resulting in a net value of relator's assets amounting to $74,136.52, instead of $20,778.64, which would have been the result if the relator were permitted to deduct its Government bonds and also to deduct the reserve, as provided in section 6386.

By its motion for rehearing the relator contended that the Supreme Court of Missouri erroneously included the amount of relator's Government bonds in its gross assets in calculating the net taxable value of its personal property, and that the decision and opinion of the Supreme Court of Missouri was in violation of Section 8 of Article I of the Constitution of the United States, giving Congress power to borrow money on the credit of the United States, as construed by numerous decisions of the Supreme Court of the United States, and in contravention of the due-process and equal-protection clauses of Section 1, of Article XIV of the Amendments to the Constitution of the United States. By its motion for rehearing the relator also con-

tended that the construction of Section 6386, R. S. of Mo. 1919, by the Supreme Court of Missouri was in violation of the express provisions of U. S. Rev. Stat., Sec. 3701, Sec. 6816, U. S. Comp. Stat. 1918, denying states and municipalities the power to tax Government bonds (Tr., pp. 42-61). In other words, it was contended by relator that the construction and application of section 6386 by the Supreme Court of Missouri, as applied to domestic insurance companies owning Government bonds, made such section repugnant to the constitutional provisions aforesaid, and to the statute of the United States exempting Government bonds from taxation. And the Supreme Court of Missouri was particularly cited to the principles set forth in the following decisions of the Supreme Court of the United States on similar questions:

Farmers Bank v. Minnesota, 232 U. S. 516;
Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136;
National Life Ins. Co. v. United States, 277 U. S. 508;
Miller v. Milwaukee, 272 U. S. 713;
Supervisors v. Stanley, 105 U. S. 305;
McCulloch v. Maryland, 4 Wheat. 316;
Weston v. Charleston, 2 Pet. 448.

D. **Cases Believed to Sustain Jurisdiction on Certiorari.**

The following decisions of this Court are believed to sustain jurisdiction on certiorari herein:

Longest v. Langford, 274 U. S. 499;

New York ex rel. Bryant v. Zimmerman, 278 U. S. 63;
Missouri, Kansas etc. Ry. Co. v. Elliott, 184 U. S., l. c. 536-537.

The decision of the Board of Equalization was based upon the theory that, although Section 6386, R. S. of Mo. 1919 authorized deduction of the reserve, it was unconstitutional. The Supreme Court of Missouri, however, having held in a companion case and in prior cases that said section was constitutional, proceeded to lay down for the first time in the history of the state the theory of arriving at the net taxable assets set forth in the opinion in this case. This was an original proceeding in the Supreme Court of Missouri, and relator's motion for rehearing in the state court afforded it its first opportunity to raise the federal question here urged. Said motion for rehearing was in the nature of a motion for new trial. The federal questions were expressly raised by the motion for rehearing, and by the opinion necessarily overruled. The record, therefore, sufficiently presents a federal question. See the following authorities:

Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U. S. 226;
Missouri, Kansas & Texas Ry. Co. v. Elliott, 184 U. S., l. c. 533-535;
Green Bay & Mississippi Canal Co. v. Patten Paper Co., 172 U. S., l. c. 66-68;
St. Louis, Iron Mountain & Southern Railway Co. v. Starbird, 243 U. S., l. c. 599;
Chapman v. Goodnow, 123 U. S., l. c. 548.

III.

STATEMENT OF CASE.

A full statement of the facts in the case will be found on pages 1 to 12 of the petition for certiorari filed herewith and to which reference is made for such facts.

IV.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Missouri erred in holding that for the purpose of determining the net value of relator's taxable personal assets under Section 6386, R. S. of Mo. 1919, it was proper to include in relator's gross assets its tax-exempt Government bonds in the sum of $94,000.00, and then apportion the total reserve between the taxable and nontaxable assets of relator, resulting in a finding that the net value of relator's taxable assets was $74,136.52, because said method of calculating relator's net taxable assets necessarily resulted in taxation, directly or indirectly, of a portion of relator's said Government bonds, in violation of Section 8 of Article I of the Constitution of the United States.

2. The Supreme Court of Missouri erred in holding that under Section 6386, R. S. of Mo. 1919, for the purpose of determining relator's net taxable assets, it was proper to include in relator's gross assets its tax-exempt Government bonds in the sum of $94,000.00 and apportion the

total reserve, or liability, between the taxable and nontaxable assets, resulting in a finding that relator's net taxable assets amounted to $74,136.52, because such method of calculating relator's net taxable assets necessarily resulted in a failure to exempt the said Government bonds from taxation, thereby violating the provisions of Section 3701, U. S. Revised Statutes (U. S. Comp. Stat. 1918, Section 6816) denying states and municipalities the power to tax Government bonds.

3. The Supreme Court of Missouri erred in finding and holding that it was proper under Section 6386, R. S. of Mo. 1919, to determine the net taxable value of relator's personal assets by including in its gross assets its tax-exempt Government bonds in the sum of $94,000.00, and apportioning the total reserve between the taxable and nontaxable assets in such proportion as the taxable assets bore to the gross assets, because such method of calculating relator's net taxable assets necessarily resulted in increasing relator's taxes beyond the plain terms of the statute by the failure to deduct the full amount of its reserve by reason of the mere circumstance that it owned Government bonds, thereby depriving the relator of its property without due process of law, in violation of the due-process clause of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

4. The Supreme Court of Missouri erred in finding and holding that it was proper, under Section 6386, R. S. of Mo. 1919, to determine the net taxable value of relator's

personal assets by including in its gross assets its tax-exempt Government bonds in the sum of $94,000.00, and apportioning the total reserve between the taxable and nontaxable assets in such proportion as the taxable assets bore to the gross assets, because such method of calculating such net taxable assets necessarily denied to the relator the right to deduct the full amount of its reserve because it owned tax-exempt Government bonds, thereby denying to the relator the equal protection of the laws guaranteed by Section 1 of Article XIV of the Amendments to the Constitution of the United States, whereas other domestic insurance companies having no Government bonds would be permitted to deduct the full amount of such reserve.

5. The Supreme Court of Missouri erred in holding that the full amount of relator's reserve should not be deducted because of the mere circumstance that it owned Government bonds in the sum of $94,000.00, thereby resulting in the taxation of a portion of relator's Government bonds and in an unwarranted and unlawful discrimination against those insurance companies owning Government bonds by subjecting them to greater burdens of taxation upon taxable property because of the ownership of some that is tax exempt.

6. The Supreme Court of Missouri, by its method of calculating the net taxable assets of the relator, erroneously diminishes the amount of legal reserve deductible under Section 6386, R. S. of Mo. 1919, and indirectly, if not di-

rectly, defeats the exemption guaranteed to owners of Government bonds, contrary to the provisions of United States Revised Statutes, Section 3701 (U. S. Comp. Stat. 1918, Sec. 6816), and contrary to the provisions of Section 8 of Article I of the Constitution of the United States and numerous decisions of the Supreme Court of the United States.

V.

SUMMARY OF ARGUMENT.

A. Illegal Taxation of, or Failure to Exempt, Government Bonds.

Government bonds owned by relator aggregating $94,000 are exempt under Section 8 of Article I of the Federal Constitution, giving to Congress the power to borrow money on the credit of the United States.

Said bonds are also exempt from taxation by states or municipalities under the express provisions of Section 3701, U. S. Rev. Stat. (U. S. Comp. Stat., Section 6816).

McCulloch v. Maryland, 4 Wheat. 316;
Weston v. City Council of Charleston, 2 Pet. 448, 469;
Farmers Bank v. Minnesota, 232 U. S. 516;
Northwestern Mutual Life Insurance Co. v. Wisconsin, 275 U. S. 136;
Miller v. Milwaukee, 272 U. S. 713;
National Life Ins. Co. v. United States, 277 U. S. 508;
Supervisors v. Stanley, 105 U. S. 305;
Home Ins. Co. v. New York, 134 U. S., l. c. 598;

Home Savings Bank v. Des Moines, 205 U. S., l. c. 509, 521;

Waco v. Amicable Life Ins. Co., 248 S. W. (Tex. Com. of Ap.) 332;

State ex rel. v. Schramm, 271 Mo., l. c. 227-228, 196 S. W. 21.

B. **Due Process of Law and Equal Protection of the Laws.**

The Supreme Court of Missouri has held Section 6386, R. S. of Mo. 1919, to be constitutional, and that the deduction therein allowed is not an exemption, but is an allowance of a deduction for debts owing by way of reaching a just amount of taxable property.

State ex rel. v. Schramm, 271 Mo., l. c. 227, 196 S. W. 21;

State ex rel. Hyde v. Buder, 315 Mo. 791, l. c. 798, 287 S. W., l. c. 309;

State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068, l. c. 1072-1073.

The Supreme Court of Missouri, by its opinion in this case, concedes that but for the ownership of Government bonds the relator would have been entitled to deduct the full amount of its reserve. In the companion cases said Supreme Court of Missouri expressly held that domestic insurance companies having no Government bonds were entitled to deduct the full amount of their reserve.

State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1073;

State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067.

The method of calculating the relator's net taxable assets set forth in the opinion of the Supreme Court of Missouri destroys the exemption from taxation given to owners of Government bonds by Section 8 of Article I of the Federal Constitution and by Section 3701, U. S. Rev. Stat., deprives the relator of its property without due process of law, denies to it the equal protection of the laws, and unlawfully discriminates against the relator and other companies owning Government bonds by refusing to permit the deduction of the full amount of the reserve as in case of those companies owning no Government bonds.

Cases, Point V, A, supra.

ARGUMENT.

A. Illegal Taxation of, or Failure to Exempt, Government Bonds.

While there is no express provision in the Constitution of the United States exempting Government bonds from taxation, ever since the decisions in McCulloch v. Maryland, 4 Wheat. 316, and Weston v. City Council of Charleston, 2 Pet. 448, it has been held that Section 8 of Article I of the Federal Constitution, giving Congress the power to borrow money on the credit of the United States, necessarily deprives the states of any power to tax federal securities, such as the bonds in question. In the Weston case, 2 Pet., l. c. 469, the Court said:

> **"The tax on Government stock is thought, by this Court, to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."**

In addition to the above-mentioned provision of the Constitution there has long been in effect Section 3701, United States Revised Statutes (U. S. Comp. Stat., Sec. 6816), expressly denying to states and municipalities power to tax Government bonds. Under these provisions of the Federal Constitution and the statutes, this Court has uniformly held that any method of taxation or calculation of assets which directly or indirectly results in the

taxation of Government securities, in whatever form, is beyond the power of the several states and the municipalities of the several states.

In addition to the above-cited cases, see the following:

Farmers Bank v. Minnesota, 232 U. S. 516;
Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136;
Miller v. Milwaukee, 272 U. S. 713;
Supervisors v. Stanley, 105 U. S. 305;
Home Insurance Co. v. New York, 134 U. S., l. c. 598;
Home Savings Bank v. Des Moines, 205 U. S., l. c. 509, 521;
National Life Ins. Co. v. United States, 277 U. S. 508.

In National Life Ins. Co. v. United States, 277 U. S. 508, we find an analogous situation. In that case Congress laid a tax on life insurance companies, based upon the sum of all interests and dividends and rents received, less certain deductions: (1) Interest derived from tax-exempt securities, if any; (2) a sum equal to 4 per cent of the company's legal reserve diminished by the amount of interest described in paragraph (1), and (3) seven other items not here involved. For the purpose of determining the net income of the company for the year 1921, the Collector included in the gross receipts of the company the income from tax-exempt securities, and while going through the form of deducting the amount of interest from tax-exempt

securities diminished the 4 per cent deduction of reserves by the amount of interest received from tax-exempt securities, and it was held that this defeated the exemption guaranteed to the owners of such securities. In holding the tax invalid, this Court said (277 U. S., l. c. 519):

> "The portion of petitioner's income from the three specified sources which Congress had power to tax—its taxable income—was the sum of these items less the interest derived from tax-exempt securities. **Because of the receipt of interest from such securities, and to its full extent, pursuing the plan of the statute, the Collector diminished the 4 per cent deduction allowable to those holding no such securities. Thus, he required petitioner to pay more upon its taxable income than could have been demanded had this been derived solely from taxable securities. If permitted, this would destroy the guaranteed exemption. One may not be subjected to greater burdens upon his taxable property solely because he owns some that is free. No device or form of words can deprive him of the exemption for which he has lawfully contracted.**"

In support of its decision in that case this Court cited the case of City of Waco v. Amicable Life Ins. Co., 230 S. W. (Tex. App.) 698, 248 S. W. (Tex. Com. of Ap.) 332. As shown by that case the State of Texas has a statute very similar to the Missouri statute requiring insurance companies to be taxed on real and personal property, but authorizing them to deduct their reserve. The Amicable Life Ins. Co., in 1919, owned personal property aggregat-

ing $2,287,780.26, included in which were United States Government bonds aggregating $906,050.00, which were admittedly exempt from state taxation under federal laws. The legal reserve was $1,631,754.06. The trial court held that the insurance company was entitled to deduct its reserve from its taxable personal assets or, in other words, that it was entitled also to deduct from its gross personal assets the full amount of its tax-exempt securities before deducting its reserve, which method left no taxable personal assets. The City appealed and the Texas Court of Appeals and also the Commission of Appeals affirmed the action of the lower court. The Commission of Appeals of Texas said (248 S. W., l. c. 333):

> "We have reached the conclusion that the trial court and the Court of Civil Appeals correctly held **that tax-free government securities cannot be taken into account in estimating the total value of the company's assets.**"

In Farmers Bank v. Minnesota, 232 U. S. 516, the question arose as to the power of the State of Minnesota to tax municipal bonds issued by a municipality of the Territory of Oklahoma, which was held to be an instrumentality and agency of the Federal Government. In that case the Court said (l. c. 526):

> "But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the Government and not in any sense a tax upon the property of the munici-

pality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them. * * * The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

"It is on this ground that United States bonds have always been held exempt from taxation under authority of the states."

The taxing law of Minnesota under consideration provided the method of determining the **net taxable assets**, but in such calculation **the Government bonds were included in the gross assets.** With respect to the effect of this system the Supreme Court of the United States said (l. c. 528):

"It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the savings bank, computed by taking into the account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. **But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds.** In Bank of Commerce v. New York City, 2 Black. 620, it was held that the State of New York, **in taxing the**

> **capital of banks according to its valuation must leave out of the calculation that portion of the capital invested in the stocks, bonds or other securities of the United States not liable to taxation by the state.** And see Bank Tax Case, 2 Wall. 200; Home Savings Bank v. Des Moines, 205 U. S. 503, 509."

To a similar effect is Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136.

In Miller v. Milwaukee, 272 U. S. 713, the plaintiff owned shares of stock in a corporation. A law of Wisconsin provided that corporations should be assessed on their income, after deducting interest on United States bonds. The interest on the United States bonds, of course, was credited to the surplus of the corporation. But the exemption was met by the State of Wisconsin by a provision that, while the stockholders were not taxed upon dividends received from corporations, the income of which was assessed, **yet if only part of the income of the corporation was assessed, only a corresponding part of the dividends or income received therefrom should be deducted from the income taxed to the stockholders.**

In holding an assessment under such law invalid, the Supreme Court of the United States said (l. c. 715):

> "It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. **If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United**

States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail, even if but for its purpose of special operation it would be perfectly good. Under the laws of Wisconsin the income from the United States bonds may not be the only item exempted from the income tax on corporations, but it certainly is the most conspicuous instance of exemption at the present time. **A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act. On that assumption the immunity of the national bonds is too important to allow any narrowing beyond what the acts of Congress permit. We think it would be going too far to say that they allow an intentional interference that is only prevented from being direct by the artificial distinction between a corporation and its members."**

In Home Savings Bank v. Des Moines, 205 U. S., l. c. 521, where a method of taxing shares of stock failed to make allowance for the proper deduction of Government bonds in determining the taxable assets, this Court said:

"If by the simple device of adopting the value of corporation shares as the measure of the taxation of the property of the corporation that property loses the immunities which the supreme law gives to it, then national securities may easily be taxed, whenever they are owned by a corporation, and the national credit has no defense against a serious wound."

These principles have been recognized and followed by the Supreme Court of Missouri, as witness the case of State ex rel. v. Schramm, 271 Mo., l. c. 227-228, where the Supreme Court quoted with approval the decision in Farmers Bank v. Minnesota, 232 U. S., l. c. 528, and said:

> "In this case, as in that, the tax is a state property tax imposed upon a 'surplus' or net assets after deducting certain liabilities. The situation is the same, and the conclusion must be the same. Since the United States bonds involved exceed the whole surplus assessed and their exclusion leaves nothing assessable, it is unnecessary to consider the taxability of the railroad stock. The record of the Board of Equalization is quashed."

It follows from the foregoing authorities that the calculation by the Supreme Court of Missouri necessarily results in the taxation of a portion of relator's Government bonds. The provisions of Sec. 6386, R. S. of Mo. 1919, permit the deduction of the reserve, which in this case is admitted to be $333,486.69. Its taxable personal assets are $354,265.33. If we do not take into consideration Government bonds in the sum of $94,000.00, this leaves the sum of $20,778.64, after deducting the reserve. The Supreme Court of Missouri, however, for the purpose of determining the net taxable assets, adds the amount of the Government bonds, $94,000.00, to the taxable assets, and prorates the reserve between the taxable and the nontaxable assets, reaching the conclusion that since

the taxable assets are approximately 84 per cent of the aggregate liability, or $280,128.81, that sum deducted from the taxable assets, leaves net taxable assets in the sum of $74,136.52 instead of $20,778.64. We earnestly contend that no matter by what devious method of calculation and no matter what purpose the Court may have in view, **the ultimate result is a failure to allow the relator its full exemption on the sum of $94,000.00 represented by its Government bonds.**

B. **Due Process of Law and Equal Protection of the Laws.**

The Supreme Court of Missouri has always construed Sec. 6386, R. S. of Mo. 1919, as giving a deduction for the purpose of arriving at a just valuation for taxable purposes. It does not allow an exemption. So, in State ex rel. v. Schramm, 271 Mo., l. c. 227, 196 S. W. 21, referring to this statute, the Missouri Supreme Court said:

> **"Revenue laws sometimes permit taxpayers to deduct from the property to be taxed the debts owing by them. The allowance is not in any sense an exemption, but is made by way of reaching the just amount of taxable property."**

In State ex rel. Hyde v. Buder, 315 Mo. 791, l. c. 798, 287 S. W., l. c. 309, after holding that Sec. 6386 R. S. 1919, had not been repealed by other statutes, the Supreme Court en banc said:

> **"To hold that the reserves of a domestic insurance company are proper subjects of taxation would be**

to ignore the plain terms of the statute which we have just ruled has not been repealed."

In State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068, the Supreme Court of Missouri, l. c. 1072-1073, reaffirmed the principles of the Schramm case, and expressly held that said section 6386 is constitutional. The following cases decided by the Supreme Court of Missouri en banc were in fact companion cases with the case at bar, and all were argued together:

State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2d) 1057;
State ex rel. Citizens' Ins. Co. v. Gehner, 8 S. W. (2d) 1066;
State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067;
State ex rel. International Life Ins. Co. v. Gehner, 8 S. W. (2d) 1067;
State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1073.

A reading of all these cases will show that it is the law of the State of Missouri that a domestic insurance company, under Sec. 6386, R. S. of Mo. 1919, having no tax exempt securities, may deduct its entire reserve. Indeed, in the following cases it was expressly held that no assessment could be made where the amount of the reserve exceeded the amount of the taxable assets:

State ex rel. Central States Life Ins. Co. v. Gehner; 8 S. W. (2d) 1073;
State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067.

It follows from the foregoing decisions and from the opinion in this case that the Supreme Court of Missouri construes Section 6386, R. S. of Mo. 1919, as authorizing a domestic insurance company having no Government bonds to deduct all of its reserve, but if, as in the case of the relator in this action, the company owns tax-exempt Government bonds, it may not deduct all of its reserve, but must place its tax-exempt securities in its gross assets and prorate the reserve between its taxable and nontaxable assets, and thereby arrive, through the method of calculation set forth in the opinion herein, at the net taxable assets. Such method of calculation will always result in taxing, directly or indirectly, a portion of the company's tax-exempt securities, or at least in a refusal to permit the deduction of the entire amount of the reserve because of the ownership of tax-exempt securities. This means that the State of Missouri says to domestic insurance companies: **"If you invest a part of your assets in Government bonds we will refuse to grant you the right to deduct the full amount of your reserve."** This, in effect, means: **"If you invest your assets in Government bonds we will tax them."**

In the case at bar the effect of such a method of assessment is readily seen. If we leave out of consideration, as should be done, the $94,000.00 in Government bonds, the total personal assets of the relator would be $354,265.33. The admitted amount of reserve is $333,486.69, leaving net taxable assets in the sum of $20,778.64, as returned by the relator. The Supreme Court of Missouri has said to the relator, however, "Since you own Government bonds in the sum of $94,000.00, which you have deducted, you are not entitled to both the deduction and the exemption under the federal law," and because relator owns said Government bonds the Missouri court finds that its taxable assets are $74,136.52 instead of $20,778.64. **In other words, the relator is held to have $53,357.88 more net taxable assets because it owns $94,000.00 in Government bonds.**

Under the foregoing situation, it is plain that the opinion of the Supreme Court of Missouri herein would deprive the relator of its property without due process of law because relator's taxes are thereby increased beyond the plain terms of the statute, as construed by said Court, merely because of the circumstance that it owns tax-exempt Government bonds. Said opinion also denies to the relator the equal protection of the laws because, on account of the mere circumstance that the relator owns such exempt securities, a percentage of its reserve is held not to be deductible, whereas other domestic insurance

companies having no Government bonds would be permitted to deduct the full amount of such reserve.

The result is evident discrimination against companies owning Government bonds, and constitutes a denial of the equal protection of the laws. In Sunday Lake Iron Co. v. Wakefield, 247 U. S., l. c. 352, this Court said:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

Again, in Southern Railway Co. v. Green, 216 U. S., l. c. 412, this Court said:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."

As we have heretofore indicated, the Supreme Court of Missouri holds that a company owning no Government bonds is entitled to deduct the full amount of its reserve. Therefore, to the extent that the relator is made to pay taxes on property in excess of $20,778.64, it has secured

no benefit from the exemption allowed owners of Government bonds. The construction of Section 6386, R. S. of Mo. 1919, does not make said statute unconstitutional. It is only the construction of said statute when applied to companies owning Government bonds that renders it obnoxious to the Constitution. As said by Mr. Justice Butler in Quaker City Cab Co. v. Pennsylvania, 277 U. S., l. c. 402:

> **"As construed and applied by the state court in this case, the section violates the equal protection clause of the Fourteenth Amendment."**

On pages 7 and 8 of appellees' "Statement in Opposition to Jurisdiction on Appeal," filed in this cause, counsel for appellees are unduly concerned about the constitutionality of Section 6386, R. S. of Mo. 1919. This Court need not be concerned with what the Supreme Court of Missouri may hold on that question after the unlawful construction of said section by the Supreme Court of Missouri in this case has been condemned by this Court. There is nothing in State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2d) 1057, which indicates that the giving to the relator and other companies owning Government bonds of the benefit of the federal exemption would make said section unconstitutional. As stated in the Schramm case, 271 Mo., l. c. 227, and State ex rel. v. Gehner, 8 S. W. (2d), l. c. 1072-1073, the deduction of the reserve allowed by section 6386 is not an exemption and does not render the

statute unconstitutional. The exemption from taxation of Government bonds is not a deduction granted by the Supreme Court of Missouri, but an exemption granted by the Federal Government. **Such bonds are exempt because the State of Missouri has no power to tax them.** There is no inequality in taxation because of the lack of power on the part of the State of Missouri to tax Government bonds. Every insurance company has the same right as relator to purchase Government bonds and carry them in its assets.

In Buist v. Charleston, 57 S. E. (S. C.) 862, the City of Charleston, under authority of an act of the Legislature, issued refunding bonds which were, by the provisions of said act, made exempt from taxation. It was sought to enjoin the issuance of the bonds on the ground that the exemption of the bonds resulted in unequal taxation, because those holding no bonds were required to pay higher taxes than those who owned bonds. The Court disposed of this objection by saying (l. c. 867):

> **"The objection stated in the eighth paragraph of the petition must be overruled, as such result is incidental to all exemptions of property from taxation. No case has been cited to show that such objection has ever rendered a statute unconstitutional."**

VI.

CONCLUSION.

It follows from the foregoing discussion that the construction and application of Section 6386, R. S. of Mo. 1919,

by the Supreme Court of Missouri in effect destroys the exemption from taxation granted by the Constitution and statutes of the United States to owners of Government bonds, deprives relator of its property without due process of law, and denies to relator the equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States and constitutes an unlawful discrimination against the relator by the refusal to permit it to deduct the full amount of its reserve because of the mere circumstance that it owned as a part of its assets tax-exempt Government bonds. If the contention of the appellant herein that this Court has jurisdiction on appeal should be found incorrect, it certainly follows that jurisdiction should be taken on certiorari.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the constitutional and statutory rights of the appellant or relator may be preserved, and that to such an end a writ of certiorari should be granted, and this Court should review the decision of the Supreme Court of Missouri and finally reverse it.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator,
Appellant (Petitioner),

vs.

FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis,
Appellees (Respondents).

No. 222.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLANT (PETITIONER).

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator, Appellant (Petitioner), vs. FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis, Appellees (Respondents).	No. 222.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLANT (PETITIONER).

STATEMENT.

Preliminary. The relator, Missouri Insurance Company, a corporation, is a domestic insurance company having its principal office in the City of St. Louis, Missouri, and at all times engaged in the life insurance business in the State of Missouri. The appellee, Frederick Gehner, is, and was at all times mentioned in this litigation, the duly elected and qualified Assessor of the City of St. Louis and President of the Board of Equalization of said City.

The other named appellees are members of said Board of Equalization.

After an assessment by said Assessor and Board of Equalization for personal taxes as of June 1, 1925, the said relator, Missouri Insurance Company, instituted this action, which is an original proceeding by certiorari begun in the Supreme Court of Missouri for the purpose of quashing the record of said Assessor and Board of Equalization (Rec., pp. 1-5). A writ of certiorari was issued by the Supreme Court of Missouri in said action on September 29, 1926 (Rec., pp. 5-6), and the cause was heard in the Supreme Court of Missouri on a stipulated record (Rec., p. 7).

The Supreme Court of Missouri, by an opinion filed February 11, 1929, quashed its writ of certiorari (Rec., pp. 14, 18), whereupon in due time the relator filed its motion for rehearing. Upon consideration of said motion for rehearing the Supreme Court of Missouri modified its opinion and refiled the same and overruled said motion on March 27, 1929 (Rec., pp. 16-19), and entered judgment accordingly.

The questions before the Supreme Court of Missouri and in this court involve the construction of Section 6386, Revised Statutes of Missouri 1919. Said section 6386, so far as relates to this appeal, is printed as appendix A to this brief.

In due time, to wit, on June 24, 1929, the relator's petition for appeal was filed and allowed by order of the Chief Justice of the Supreme Court of the State of Missouri

(Rec., pp. 28-29). Subsequently, after the papers on appeal were duly filed in this Court, the relator also filed its petition for certiorari on the record filed in conjunction with the appeal.

The Facts. The stipulated record below shows that, subsequent to June 1, 1925, and as of said date, as required by law, the relator duly made its tax return to said Assessor of the City of St. Louis, of all its property for taxation. In said return and as a basis for arriving at the taxable value of its property, the relator set down its property as follows, to wit (Rec., pp. 7-8):

Real Estate		$142,000.00
Bonds, Municipal		289,000.00
Bonds, Government		94,000.00
Bonds, Mortgages		60,000.00
Cash		5,265.33
Total Assets		$590,265.33
Reserve		$326,522.69
Total assets		$590,265.33
Less real estate on which the Company pays taxes	$142,000.00	
Less reserve required by law.	326,522.69	
Less United States Government Bonds	94,000.00	
Less unpaid policy claims, sick	5,143.00	
Less unpaid policy claims, death	1,821.00	$569,486.69
		$ 20,778.64

(Note: There is a clerical error in subtraction in the stipulated record, wherein the net taxable assets of relator's return are shown as $30,778.64, whereas the amount should be $20,778.64, as found by the Supreme Court in its opinion, as shown on page 16 of the record.)

On the face of said return the net amount of relator's personal property subject to taxation on June 1, 1925, was $20,778.64. This amount was arrived at in said return by deducting from relator's total assets real estate otherwise taxed, not here involved, in the sum of $142,000.00, and United States Government bonds in the sum of $94,000.00, leaving taxable personal assets of $354,265.33. The relator then deducted from said taxable assets its legal reserve including unpaid policy claims, shown by its said return and conceded to be correct, in the sum of $333,486.69, leaving net taxable assets in said sum of $20,778.64.

Notwithstanding the aforesaid return and facts therein stated, said Board of Equalization, on March 31, 1926, duly notified the relator of its intention to assess the relator on said return for cash in bank, $5,260.00, and solvent bonds, $349,000.00, and required the relator to appear before said board at a time stated and show cause why such assessment should not be made. Thereafter, in conformity to said notice, the relator appeared before the said board and a hearing was had under said notice (Rec., pp. 8-9). Upon said hearing said Board of Equalization made its findings in accordance with the facts stated in said re-

turn, but also determined that, notwithstanding the legally required reserve and unpaid policy claims amounted to $333,486.69, the relator was not entitled to deduct said reserve from its total assets amounting to $354,265.33, because in the opinion of said board, based upon the advice of the City Counselor of the City of St. Louis, Section 6386 of the Revised Statutes of Missouri, 1919, under which the relator sought to deduct said legal reserve, was unconstitutional and in contravention of Article I, Sections 3, 4 and 7 of the Constitution of the State of Missouri requiring uniformity of taxation, and said board thereupon arbitrarily fixed the amount of relator's net taxable personal property at the sum of $50,000.00. Said board did not refuse to deduct the amount of relator's Government bonds, but based its finding solely upon the alleged invalidity of said Section 6386 (Rec., pp. 10-12).

Thereafter, the appellant, State of Missouri, at the relation of Missouri Insurance Company, instituted this original action by certiorari in the Supreme Court of the State of Missouri, and obtained a writ of certiorari against the appellees herein (Rec., pp. 2-6). In due time said cause came on for hearing before the Supreme Court of Missouri, en banc, and after said Court had in other cases determined that said Sec. 6386, R. S. Mo. 1919, was not unconstitutional, and that deductions by life insurance companies, as claimed by the relator, were valid and proper (State ex rel. Missouri State Life Ins. Co. v. Gehner, City Assessor, et al, 8 S. W. [2d] 1068; State ex rel.

Central States Life Ins. Co. v. Gehner, City Assessor, et al, 8 S. W. [2d] 1073; State ex rel. Indemnity Co. of Missouri v. Gehner, City Assessor, et al, 8 S. W. [2d] 1067).

On consideration of said cause said Supreme Court of Missouri, at its October Term, 1928, entered its opinion sustaining the assessment by the respondents in the sum of $50,000.00, not upon the theory that said Sec. 6386 R. S. of Mo. 1919, was unconstitutional, but on the theory that since the relator owned United States Government bonds in the sum of $94,000.00, and personal assets amounting to $354,265.33, both of which were subject to liabilities (legal reserve) aggregating $333,486.69, the net taxable assets should be determined by apportioning the total liability between the two classes of property, according to their respective amounts, and then deducting from the taxable assets the liability so apportioned to that class, by which calculation said Supreme Court found that the taxable assets were approximately 79.03 per cent of the cross assets ($354,265.33), and then found that 79.03 per cent of the aggregate liability in dollars and cents was $263,554.53, which sum was deducted from said gross assets in the sum of $354,265.33, leaving net taxable assets according to said opinion in the sum of $90,710.80. Said sum being greater than the amount assessed by the Board of Equalization, said Supreme Court held that its writ of certiorari should be quashed (Rec., pp. 14-16).

Said opinion was the first pronouncement of said Supreme Court of Missouri holding that a domestic life

insurance company, under section 6386, was not entitled to deduct from its gross personal assets the full amount of its legal reserve, and also the amount of its United States Government bonds. Said opinion for the first time construed section 6386 as authorizing the apportionment of the legal reserve of domestic insurance companies between taxable and nontaxable assets, and for that purpose including in gross assets its nontaxable assets or United States Government bonds in calculating its net taxable assets under said section 6386.

In due time the appellant filed its motion for a rehearing in said cause before said Supreme Court of Missouri. Said motion is printed as Appendix B to this brief.

In said motion for rehearing the relator contended (a) that the holding of the Supreme Court of Missouri and its method of calculating the net taxable assets of the relator contravened the due-process and equal-protection-of-the-laws clauses of Sec. 1 of Art. XIV of the Amendments to the Constitution of the United States; (b) that the construction of said section 6386 contained in said opinion in effect authorized the taxation, directly or indirectly, of relator's United States Government bonds, in contravention of Section 8 of Article I of the Constitution of the United States, giving Congress the right to borrow money on the credit of the United States, as construed in McCulloch v. Maryland, 4 Wheat. 316, and numerous other cases; (c) that said construction of section 6386 and the method of calculating relator's net taxable assets resulted

in depriving the relator of at least a portion of its exemption of its Government bonds, in violation of the express provisions of United States Revised Statutes, Sec. 3701, U. S. Comp. Stat. 1918, Sec. 6816, denying states and municipalities the power to tax Government bonds, and (d) that said opinion also resulted in unlawful discrimination against the relator by taking into account its ownership of tax-exempt Government bonds in determining the net taxable value of its personal assets, and refusing to permit the deduction of both legal reserve and Government bonds.

Upon consideration of relator's motion for rehearing the Supreme Court of Missouri modified its said opinion and overruled relator's said motion (Rec., pp. 16-19), and entered judgment accordingly.

The only change appearing in the modified opinion is in the method of calculating of the net taxable assets. Said changed method of calculation is as follows: The relator's gross taxable assets, amounting to $590,265.33, are taken as the basis of the calculation instead of the sum of $354,265.33, from which the Court concludes that the taxable assets are approximately 84 per cent of the gross assets, and that 84 per cent of the aggregate liability is $280,128.81, resulting in a net taxable value of $74,136.52 instead of $90,710.80, as in the original opinion. This difference results from adding the amount of the real estate—$142,000.00—to the taxable assets of $354,265.33.

SPECIFICATIONS OF ERROR.

The errors assigned on appeal and in the petition for writ of certiorari, and now urged, are:

I.

By its opinion and judgment herein the Supreme Court of Missouri has erroneously construed Section 6386, R. S. of Mo. 1919, as authorizing the apportionment of the legal reserve between the taxable and nontaxable assets of relator, and for that purpose to include in relator's gross assets its Government bonds in the sum of $94,000.00 for the purpose of calculating the net value of its taxable personal assets, thereby resulting in the taxation of at least a portion of relator's tax-exempt Government bonds. In so far as the Supreme Court of Missouri so construed and applied section 6386, said section is made to authorize the taxation of relator's tax-exempt Government bonds, in violation of the provision of the Constitution of the United States (Section 8 of Article I), giving Congress power to borrow money on the credit of the United States, as construed by numerous decisions of the Supreme Court of the United States.

II.

The Supreme Court of Missouri, by its opinion and judgment herein, has held that Section 6386, R. S. of Mo. 1919, authorizes the apportionment of the legal reserve

authorized to be deducted by said statute between the taxable and nontaxable assets of domestic insurance companies, thereby discriminating against such insurance companies as might own Government bonds, in contravention of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that no state shall make or enforce any law which shall deprive any person of property without due process of law, or deny to any person the equal protection of the laws. Such construction and application of section 6386 by the Supreme Court of Missouri deprives relator of its property without due process of law, because its taxes are thereby increased beyond the plain terms of the statute by the failure to deduct the full amount of its reserve by reason of the mere circumstance that it owned Government bonds, and such action of said Court deprives the relator of the equal protection of the laws because, on account of the mere circumstance that the relator owned exempt securities, a percentage of its reserve is held to be not deductible, whereas other domestic insurance companies having no Government bonds would be permitted to deduct the full amount of such reserve.

III.

The Supreme Court of Missouri erred in including in relator's gross assets its nontaxable securities in calculating its net taxable assets because such inclusion necessarily resulted in the taxing of at least a portion of relator's Government bonds in violation of the express

provisions of U. S. Revised Statutes, Section 3701, Section 6816, U. S. Comp. Stat. 1918, denying states and municipalities the power to tax Government bonds, and contrary to numerous decisions of the Supreme Court of the United States.

IV.

For the purpose of calculating relator's net taxable assets, the opinion and judgment of the Supreme Court of Missouri erroneously includes in the relator's gross assets its tax-exempt Government bonds in the sum of $94,000.00, thereby resulting in the taxation of a portion of relator's said Government bonds, or at least resulting in an unwarranted and unlawful discrimination against domestic insurance companies owning Government bonds, by subjecting relator and other companies owning such bonds to greater burdens of taxation upon taxable property because of the ownership of some that is exempt.

V.

The Supreme Court of Missouri, by its method of calculating the net taxable assets of the relator, diminishes the amount of legal reserve deductible under Section 6386, R. S. of Missouri 1919, and thereby defeats the exemption guaranteed to owners of Government bonds contrary to U. S. Revised Statutes, Section 3701, U. S. Comp. Stat. 1918, Section 6816, and Section 8, Article I of the Constitution of the United States, and contrary to numerous decisions of the Supreme Court of the United States.

BRIEF.

I. The Government bonds owned by relator, aggregating $94,000.00, were exempt under Section 8 of Article I of the Federal Constitution, giving to Congress the power to borrow money on the credit of the United States. Said bonds were also exempt from taxation by states and municipalities under the express provisions of Section 3701, United States Revised Statutes (U. S. Comp. Stat., Sec. 6816).

McCulloch v. Maryland, 4 Wheat. 316;
Weston v. City Council of Charleston, 2 Pet. 448, 489;
Farmers Bank v. Minnesota, 232 U. S. 516;
Supervisors v. Stanley, 105 U. S. 305;
Home Ins. Co. v. New York, 134 U. S., l. c. 598;
Home Savings Bank v. Des Moines, 205 U. S., l. c. 509, 521.

II. In construing Sec. 6386 as authorizing the apportionment of the legal reserve between the relative taxable and nontaxable assets according to their respective amounts, and then deducting from the taxable assets the liabilities so apportioned to that class, the opinion of the Supreme Court of Missouri contravenes Section 8 of Article I of the Federal Constitution, giving Congress the right to borrow money on the credit of the United States, because such method of calculating relator's net assets inevitably results in denying the exemption of such bonds

from taxation under said provision of the Constitution. By taking into consideration relator's United States Government bonds in so calculating the net assets, some portion of the burden of the tax must be attributable to the ownership of such Government bonds.

Farmers Bank v. Minnesota, 232 U. S. 516;
Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136;
Miller v. Milwaukee, 272 U. S. 713;
National Life Ins. Co. v. United States, 277 U. S. 508;
City of Waco v. Amicable Life Ins. Co., 230 S. W. (Tex. App.) 698, 248 S. W. (Tex. Com. of App.) 332.

III. One of the necessary results of the method of calculating the net taxable assets of relator by the Supreme Court of Missouri is in effect to tax a portion of its deductible legal reserve. In other words, such method subjected the relator's taxable property to greater burdens because it owned some that was free from taxation. This, indirectly at least, deprived the relator of its exemption. Missouri authorities had no right to do indirectly what they could not do directly, and the inclusion of the Government bonds in the calculation resulted in a construction of Sec. 6386 repugnant to the constitutional provision aforesaid.

National Life Ins. Co. v. United States, 277 U. S. 508;

City of Waco v. Amicable Life Ins. Co., 230 S. W. (Tex. App.) 698, 248 S. W. (Tex. Com. of App.) 332;
Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136;
Miller v. Milwaukee, 272 U. S. 713;
Farmers Bank v. Minnesota, 232 U. S. 516.

IV. Under the plain terms of Sec. 6383, R. S. of Mo. 1919, and the decisions of the Supreme Court of Missouri construing said section, the reserves of domestic insurance companies are deductible from the gross taxable assets.

State ex rel. Hyde v. Buder, 315 Mo., l. c. 798, 287 S. W., l. c. 309;
State ex rel. v. Schramm, 271 Mo., l. c. 227, 198 S. W. 21.

The Supreme Court of Missouri has, therefore, repeatedly held that the entire legal reserve is deductible, and that domestic insurance companies having no tax-exempt securities may deduct their entire reserve.

State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1073;
State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067.

Consequently, as construed and applied by the Missouri Supreme Court in this case, Sec. 6386 is made to contra-

vene the due process and equal protection clauses of Section 1 of Article XIV of the Amendments to the Constitution of the United States. It deprives the relator of its property without due process of law, because relator's taxes are thereby increased beyond the plain terms of the statute, Sec. 6386, by the failure to deduct the full amount of its reserve on account of the mere circumstance that it owned tax-exempt Government bonds, and it deprives the relator of the equal protection of the laws, because, on account of the mere circumstance that the relator owned exempt securities, a percentage of its reserve was held not deductible, whereas other domestic insurance companies having no Government bonds are permitted to deduct the full amount of the reserve.

Sunday Lake Iron Co. v. Wakefield, 247 U. S., l. c. 352;
Southern Ry. Co. v. Green, 216 U. S., l. c. 412;
Quaker City Cab Co. v. Pennsylvania, 277 U. S., l. c. 402;
Miller v. Milwaukee, 272 U. S., l. c. 714-715.

V. The same result is reached with reference to the violation of the due process and equal protection clauses of Section 1 of Article XIV of the Amendments to the Constitution of the United States, because of the express exemption of United States Government bonds, under the provisions of United States Revised Statutes, Sec. 3701.

VI. There is no merit in the contention of counsel for appellees, in their brief on jurisdiction, that to permit the

deduction of both the legal reserve and of the tax-exempt Government bonds would result in unequal taxation and make Sec. 6386 unconstitutional. Government bonds are exempt, not by any action of the state, but because, under the Federal Constitution and laws, the state has no power to tax them, and the legal reserve has been expressly held by the Missouri Court to be deductible, under Sec. 6386.

State ex rel. Hyde v. Buder, 315 Mo., l. c. 798, 287 S. W., l. c. 309;
State ex rel. v. Schramm, 271 Mo., l. c. 227, 196 S. W. 21;
Buist v. Charleston, 57 S. E. (S. C.), l. c. 867.

ARGUMENT.

I.

Nature of Ruling Below and Issues Involved Here.

The facts are simple and undisputed. The Missouri insurance company is a domestic insurance company, taxable under the provisions of Section 6386, Revised Statutes of Missouri 1919 (Appendix A attached hereto). The case involves an assessment for personal taxes for the year 1925. In its return filed with the Assessor showing its property as of June 1, 1925, said relator totaled assets as follows (Rec., p. 7):

Real estate	$142,000.00
Bonds, municipal	289,000.00
Bonds, Government	94,000.00
Bonds, mortgages	60,000.00
Cash	5,265.33
Total assets	$590,265.33

Its total legal reserve, including unpaid policy claims, was shown to be $333,486.69 (Rec., p. 8).

In its return, therefore, relator made the following deductions (Rec., p. 8):

Real estate (otherwise taxed)	$142,000.00
Reserve and unpaid policy claims	333,486.69
U. S. Government bonds	94,000.00
Total deductions	$569,486.69

This left net taxable assets in the sum of $20,778.64, which is conceded to be correct if relator is entitled to deduct both legal reserve and United States Government bonds.

The Board of Equalization refused to allow the deduction of $333,486.69 on the expressed ground that said section 6386 was unconstitutional, in that it violated the provisions of Section 4 of Article X of the Constitution of Missouri (Rec., p. 11). Instead, however, of assessing the total amount of property of relator as increased by the failure to allow such deduction, said board arbitrarily assessed relator in the sum of $50,000.00 (Rec., pp. 12, 16).

On certiorari, the Supreme Court of Missouri did not entertain the view of the board as to the unconstitutionality of section 6386, having affirmed the constitutionality of said section and relator's right to deduct its reserve by repeated decisions. But the Missouri court did refuse to allow the relator to deduct both its United States Government bonds and its legal reserve. After holding that the legal reserve was a liability against all of relator's property, both taxable and nontaxable, and stating that relator's gross assets were $590,265.33, which were subject to liabilities (reserve) aggregating $333,486.69, the Court propounded the query: "What is the **net** value of the taxable personal assets under section 6386?" The Court then makes its conclusion and calculation as follows (Rec., pp. 17-18):

"We know of no more equitable way to determine such value than that of apportioning the total liability between the two classes of assets (the taxable and the nontaxable) according to their respective amounts and then deducting from the taxable assets the liability so apportioned to that class. The taxable assets are approximately 84 per cent of the gross assets; 84 per cent of the aggregate liability is, in dollars and cents, $280,128.81; that sum deducted from the gross value in money of the taxable personal assets ($354,265.33) leaves $74,136.52, their net value. As this sum is greater than that at which relator's personal property was assessed by the Board of Equalization, its record should not be quashed."

It will be noted that instead of deducting in full both the reserve and the tax-exempt Government bonds, the Missouri court **takes the gross assets of $590,265.33 (which includes both Government bonds and real estate)** as a basis for calculating the net value of the taxable assets and apportions the liability between the nontaxable and taxable assets ($94,000.00 and $354,265.33). The result is that only $280,128.81 of the total legal reserve is allowed to be deducted, and $53,357.88 more property is assessed to relator, which sum, with the $20,778.64 equals $74,136.52, the amount fixed by the Court.

No matter what devious route be pursued to reach the result, or in what language the calculation be couched, it must be conceded that by cold figures **the relator's net taxable assets are increased by $53,357.88 in failing to allow the deduction of both legal reserve and Government bonds.**

The questions on this appeal relate to the validity and constitutionality of the Missouri court's construction and application of said section 6386.

II.

Illegal Taxation of, or Failure to Exempt, Government Bonds.

While there is no express provision in the Constitution of the United States exempting Government bonds from taxation, ever since the decisions in McCulloch v. Maryland, 4 Wheat. 316, and Weston v. City Council of Charleston, 2 Pet. 448, it has been held that Section 8 of Article I of the Federal Constitution giving Congress the power to borrow money on the credit of the United States, necessarily deprives the states of any power to tax federal securities, such as the bonds in question. In the Weston case, 2 Pet., l. c. 469, the Court said:

> **"The tax on Government stock is thought, by this Court, to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."**

In addition to the above-mentioned provision of the Constitution there has long been in effect Section 3701, United States Revised Statutes (U. S. Comp. Stat., Sec. 6816), expressly denying to states and municipalities power to tax Government bonds. Under these provisions of the Federal Constitution and the statutes, this Court has uni-

formly held that any method of taxation or calculation of assets which directly or indirectly results in the taxation of Government securities, in whatever form, is beyond the power of the several states and the municipalities of the several states.

In National Life Ins. Co. v. United States, 277 U. S. 508, we find an analogous situation. In that case Congress laid a tax on life insurance companies, based upon the sum of all interests and dividends and rents received, less certain deductions: (1) Interest derived from tax-exempt securities, if any; (2) a sum equal to 4 per cent of the company's legal reserve diminished by the amount of interest described in paragraph (1), and (3) seven other items not here involved. For the purpose of determining the net income of the company for the year 1921, the Collector included in the gross receipts of the company the income from tax-exempt securities, and while going through the form of deducting the amount of interest from tax-exempt securities diminished the 4 per cent deduction of reserves by the amount of interest received from tax-exempt securitis, and it was held that this defeated the exemption guaranteed to the owners of such securities. In holding the tax invalid, this Court said (277 U. S., l. c. 519):

> "The portion of petitioner's income from the three specified sources which Congress had power to tax—its taxable income—was the sum of these items less the interest derived from tax-exempt sceurities. **Because of the receipt of interest from such securities, and to**

its full extent, pursuing the plan of the statute, the Collector diminished the 4 per cent deduction allowable to those holding no such securities. Thus, he required petitioner to pay more upon its taxable income than could have been demanded had this been derived solely from taxable securities. If permitted, this would destroy the guaranteed exemption. One may not be subjected to greater burdens upon his taxable property solely because he owns some that is free. No device or form of words can deprive him of the exemption for which he has lawfully contracted."

In support of its decision in that case this Court cited the case of City of Waco v. Amicable Life Ins. Co., 230 S. W. (Tex. App.) 698, 248 S. W. (Tex. Com. of Ap.) 332. As shown by that case, the State of Texas has a statute very similar to the Missouri statute requiring insurance companies to be taxed on real and personal property, but authorizing them to deduct their reserve. The Amicable Life Ins. Co., in 1919, owned personal property aggregating $2,287,780.26, included in which were United States Government bonds aggregating $906,050.00, which were admittedly exempt from state taxation under federal laws. The legal reserve was $1,631,754.06. The trial court held that the insurance company was entitled to deduct its reserve from its taxable personal assets, or, in other words, that it was entitled also to deduct from its gross personal assets the full amount of its tax-exempt securities before deducting its reserve, which method left no taxable personal assets. The City appealed and the Texas Court of

Appeals and also the Commission of Appeals affirmed the action of the lower court. The Commission of Appeals of Texas said (248 S. W., l. c. 333):

> "We have reached the conclusion that the trial court and the Court of Civil Appeals correctly held **that tax-free Government securities cannot be taken into account in estimating the total value of the company's assets.**"

In Farmers Bank v. Minnesota, 232 U. S. 516, the question arose as to the power of the State of Minnesota to tax municipal bonds issued by a municipality of the Territory of Oklahoma, which was held to be an instrumentality and agency of the Federal Government. In that case the Court said (l. c. 526):

> "But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the Government and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them. * * * The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

"It is on this ground that United States bonds have always been held exempt from taxation under authority of the states."

The taxing law of Minnesota under consideration provided the method of determining the **net taxable assets**, but in such calculation **the Government bonds were included in the gross assets.** With respect to the effect of this system the Supreme Court of the United States said (l. c. 528):

"It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the savings bank, computed by taking into the account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. **But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds.** In Bank of Commerce v. New York City, 2 Black. 620, it was held that the State of New York, **in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital invested in the stocks, bonds or other securities of the United States not liable to taxation by the state.** And see Bank Tax Case, 2 Wall. 200; Home Savings Bank v. Des Moines, 205 U. S. 503, 509."

To a similar effect is Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136.

In Miller v. Milwaukee, 272 U. S. 713, the plaintiff owned

shares of stock in a corporation. A law of Wisconsin provided that corporations should be assessed on their income, after deducting interest on United States bonds. The interest on the United States bonds, of course, was credited to the surplus of the corporation. But the exemption was met by the State of Wisconsin by a provision that, while the stockholders were not taxed upon dividends received from corporations, the income of which was assessed, **yet if only part of the income of the corporation was assessed, only a corresponding part of the dividends or income received therefrom should be deducted from the income taxed to the stockholders.**

In holding an assessment under such law invalid, the Supreme Court of the United States said (l. c. 715):

> "It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. **If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail, even if but for its purpose of special operation it would be perfectly good.** Under the laws of Wisconsin the income from the United States bonds may not be the only item exempted from the income tax on corporations, but it certainly is the most conspicuous instance of exemption at the present time. **A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act.**

On that assumption the immunity of the national bonds is too important to allow any narrowing beyond what the acts of Congress permit. We think it would be going too far to say that they allow an intentional interference that is only prevented from being direct by the artificial distinction between a corporation and its members."

In Home Savings Bank v. Des Moines, 205 U. S., l. c. 521, where a method of taxing shares of stock failed to make allowance for the proper deduction of Government bonds in determining the taxable assets, this Court said:

"If by the simple device of adopting the value of corporation shares as the measure of the taxation of the property of the corporation that property loses the immunities which the supreme law gives to it, then national securities may easily be taxed, whenever they are owned by a corporation, and the national credit has no defense against a serious wound."

These principles have been recognized and followed by the Supreme Court of Missouri, as witness the case of State ex rel. v. Schramm, 271 Mo., l. c. 227-228, where the Supreme Court quoted with approval the decision of Farmers Bank v. Minnesota, 232 U. S., l. c. 528, and said:

"In this case, as in that, the tax is a state property tax imposed upon a 'surplus' or net assets after deducting certain liabilities. The situation is the same, and the conclusion must be the same. Since the United States bonds involved exceed the whole sur-

plus assessed and their exclusion leaves nothing assessable, it is unnecessary to consider the taxability of the railroad stock. The record of the Board of Equalization is quashed."

It follows from the foregoing authorities that the calculation by the Supreme Court of Missouri necessarily results in the taxation of a portion of relator's Government bonds. The provisions of Sec. 6386, R. S. of Mo. 1919, permit the deduction of the reserve, which in this case is admitted to be $333,486.69. Its personal assets are $354,265.33. If we do not take into consideration Government bonds in the sum of $94,000.00, this leaves the sum of $20,778.64, after deducting the reserve. The Supreme Court of Missouri, however, for the purpose of determining the net taxable assets, adds the amount of the Government bonds—$94,000.00—to the taxable assets, and prorates the reserve between the taxable and the nontaxable assets, reaching the conclusion that since the taxable assets are approximately 84 per cent of the aggregate liability, or $280,128.81, that sum deducted from the taxable assets, leaves net taxable assets in the sum of $74,136.52 instead of $20,778.64. We earnestly contend that no matter by what devious method of calculation and no matter what purpose the Court may have in view, **the ultimate result is a failure to allow the relator its full exemption on the sum of $94,000.00 represented by its Government bonds.**

It appears from the calculations by the Missouri court in its modified opinion (Rec., p. 17) that the sum of $590,265.33 (which includes both real estate and Government bonds) is taken as the basis of calculating the percentage, but in arriving at the net assets the sum of $354,265.33 is taken as the taxable personal assets. It cannot be said that the Court intended to deduct the sum of $94,000.00 also, because if that were done **no assessment would result even under the state court's theory.** The fallacies in the calculations are not explained away by the ingenious juggling of figures by counsel for appellees on pages 13 and 14 of their brief in opposition to the issuance of the writ of certiorari in this court, where they attempt to rewrite the opinion of the court below. Any theory of apportionment sought to be applied in this case will inevitably result in destroying the exemption to which the Government bonds are entitled. This is true because, by such apportionment, the Government bonds must necessarily be taken as a part of the gross assets or of the taxable assets. The inconsistency of leaving out of consideration the real estate on which taxes are otherwise paid, and at the same time including the Government bonds, evidently caused the state court to modify its opinion on motion for rehearing, **but even in the modified opinion the real estate is deducted in full.** It is evident, however, **that the federal exemption ought to be just as effective as to the Government bonds as payment of taxes on taxable property.**

In any view, therefore, as construed and applied by the Missouri court, section 6386 is made to violate Section 8 of Article I of the Federal Constitution, giving to Congress the power to borrow money on the credit of the United States, in that relator's exemption is indirectly, if not directly, defeated.

III.

Due Process of Law and Equal Protection of the Laws.

The Supreme Court of Missouri has always construed Section 6386, R. S. of Mo. 1919, as giving a deduction for the purpose of arriving at a just valuation for taxable purposes. It does not allow an exemption. So, in State ex rel. v. Schramm, 271 Mo., l. c. 227, 196 S. W. 21, referring to this statute, the Missouri Supreme Court said:

> **"Revenue laws sometimes permit taxpayers to deduct from the property to be taxed the debts owing by them. The allowance is not in any sense an exexemption, but is made by way of reaching the just amount of taxable property."**

In State ex rel. Hyde v. Buder, 315 Mo. 791, l. c. 798, 287 S. W., l. c. 309, after holding that Sec. 6386, R. S. 1919, had not been repealed by other statutes, the Supreme Court en banc said:

> **"To hold that the reserves of a domestic insurance company are proper subjects of taxation would be**

to ignore the plain terms of the statute which we have just ruled has not been repealed."

In State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068, the Supreme Court of Missouri, l. c. 1072-1073, reaffirmed the principles of the Schramm case, and expressly held that said section 6386 is constitutional. The following cases decided by the Supreme Court of Missouri en banc were in fact companion cases with the case at bar, and all were argued together:

State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2d) 1057;
State ex rel. Citizens' Ins. Co. v. Gehner, 8 S. W. (2d) 1066;
State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067;
State ex rel. International Life Ins. Co. v. Gehner, 8 S. W. (2d) 1067;
State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1073.

A reading of all these cases will show that it is the law of the State of Missouri that a domestic insurance company, under Sec. 6386, R. S. of Mo. 1919, having no tax-exempt securities, may deduct its entire reserve. Indeed, in the following cases it was expressly held that no as-

sessment could be made where the amount of the reserve exceeded the amount of the taxable assets:

State ex rel. Central States Life Ins. Co. v. Gehner; 8 S. W. (2d) 1073;
State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067.

It follows from the foregoing decisions and from the opinion in this case that the Supreme Court of Missouri construes Section 6386, R. S. of Mo. 1919, as authorizing a domestic insurance company having no Government bonds to deduct all of its reserve, but if, as in the case of the relator in this action, the company owns tax-exempt Government bonds, it may not deduct all of its reserve but must place its tax-exempt securities in its gross assets and prorate the reserve between its taxable and nontaxable assets, and thereby arrive, through the method of calculation set forth in the opinion herein, at the net taxable assets. Such method of calculation will always result in taxing, directly or indirectly, a portion of the company's tax-exempt securities, or at least in a refusal to permit the deduction of the entire amount of the reserve because of the ownership of tax-exempt securities. This means that the State of Missouri says to domestic insurance companies: **"If you invest a part of your assets in Government bonds we will refuse to grant you the right to deduct the full amount of your reserve."** This, in effect,

means: **"If you invest your assets in Government bonds we will tax them."**

In the case at bar the effect of such a method of assessment is readily seen. If we leave out of consideration, as should be done, the $94,000.00 in Government bonds, the total personal assets of the relator would be $354,265.33. The admitted amount of reserve is $333,486.69, leaving net taxable assets in the sum of $20,778.64, as returned by the relator. The Supreme Court of Missouri has said to the relator, however, "Since you own Government bonds in the sum of $94,000.00, which you have deducted, you are not entitled to both the deduction and the exemption under the federal law," and because relator owns said Government bonds the Missouri court finds that its taxable assets are $74,136.52, instead of $20,778.64. **In other words, the relator is held to have $53,357.88 more net taxable assets because it owns $94,000.00 in Government bonds.**

Under the foregoing situation, it is plain that the opinion of the Supreme Court of Missouri herein would deprive the relator of its property without due process of law, because relator's taxes are thereby increased beyond the plain terms of the statute, as construed by said Court, merely because of the circumstance that it owns tax-exempt Government bonds. Said opinion also denies to the relator the equal protection of the laws because, on account of the mere circumstance that the relator owns such exempt securities, a percentage of its reserve is held

not to be deductible, whereas other domestic insurance companies having no Government bonds would be permitted to deduct the full amount of such reserve.

The result is evident discrimination against companies owning Government bonds, and constitutes a denial of the equal protection of the laws. In Sunday Lake Iron Co. v. Wakefield, 247 U. S., l. c. 352, this Court said:

> **"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly-constituted agents."**

Again, in Southern Railway Co. v. Green, 216 U. S., l. c. 412, this Court said:

> **"The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."**

As we have heretofore indicated, the Supreme Court of Missouri holds that a company owning no Government bonds is entitled to deduct the full amount of its reserve.

Therefore, to the extent that the relator is made to pay taxes on property in excess of $20,778.64, it has secured no benefit from the exemption allowed owners of Government bonds. The construction of Section 6386, R. S. of Mo. 1919, does not make said statute unconstitutional. It is only the construction of said statute when applied to companies owning Government bonds that renders it obnoxious to the Constitution. As said by Mr. Justice Butler in Quaker City Cab Co. v. Pennsylvania, 277 U. S., l. c. 402:

> **"As construed and applied by the state court in this case, the section violates the equal protection clause of the Fourteenth Amendment."**

On pages 7 and 8 of appellees' "Statement in Opposition to Jurisdiction on Appeal," filed in this cause, counsel for appellees are unduly concerned about the constitutionality of Section 6386, R. S. of Mo. 1919. This Court need not be concerned with what the Supreme Court of Missouri may hold on that question after the unlawful construction of said section by the Supreme Court of Missouri in this case has been condemned by this Court. There is nothing in State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2d) 1057, which indicates that the giving to the relator and other companies owning Government bonds of the benefit of the federal exemption would make said section unconstitutional. As stated in the Schramm case, 271 Mo., l. c. 227, and State ex rel. v. Gehner, 8 S. W. (2d), l. c. 1072-1073, the deduction of the reserve allowed by section 6386 is not an exemption and

does not render the statute unconstitutional. The exemption from taxation of Government bonds is not a deduction granted by the Supreme Court of Missouri, but an exemption granted by the Federal Government. **Such bonds are exempt because the State of Missouri has no power to tax them.** There is no inequality in taxation because of the lack of power on the part of the State of Missouri to tax Government bonds. Every insurance company has the same right as relator to purchase Government bonds and carry them in its assets.

In Buist v. Charleston, 57 S. E. (S. C.) 862, the City of Charleston, under authority of an act of the Legislature, issued refunding bonds which were, by the provisions of said act, made exempt from taxation. It was sought to enjoin the issuance of the bonds on the ground that the exemption of the bonds resulted in unequal taxation, because those holding no bonds were required to pay higher taxes than those who owned bonds. The Court disposed of this objection by saying (l. c. 867):

> **"The objection stated in the eighth paragraph of the petition must be overruled, as such result is incidental to all exemptions of property from taxation. No case has been cited to show that such objection has ever rendered a statute unconstitutional."**

What we have said with reference to discrimination as to the exemption under the Federal Constitution applies also in connection with the exemption allowed under the express provisions of U. S. Revised Statutes, Sec. 3701.

IV.

Conclusion.

It follows from the foregoing discussion and the authorities cited in our brief that the construction and application of said section 6386 by the Supreme Court of Missouri in effect destroys the exemption from taxation granted by the Constitution and statutes of the United States, deprives relator of its property without due process of law, denies to it the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Federal Constitution and constitutes an unlawful discrimination against the relator by the refusal to permit it to deduct the full amount of its legal reserve, because of the mere circumstance that it owned as a part of its assets tax-exempt Government bonds. We believe this Court has jurisdiction of these questions on appeal and that the judgment of the state court should be reversed. If our view as to jurisdiction on appeal is incorrect, certainly jurisdiction should then be taken on certiorari.

Respectfully submitted,

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APPENDIX A.

The provisions of Section 6386, Revised Statutes of Missouri, 1919, as construed and applied by the original opinion of the Supreme Court of Missouri, as well as by its modified opinion in this case, are as follows:

> "Sec. 6386. **Home Companies Subject to What Tax.** —The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals."

APPENDIX B.

In the

Supreme Court of Missouri,
En Banc.

October Term, 1928.

State of Missouri at the Relation of Missouri Insurance Company, a Corporation,
Relator,
vs.
Frederick Gehner, as Assessor of the City of St. Louis, et al.,
Respondents.
No. 27,549.

RELATOR'S MOTION FOR REHEARING.

Now comes the relator and moves the Court to grant it a rehearing in this cause for the reason that the Court has based its opinion upon a misapprehension of the facts, and has inadvertently overlooked the following decisive and material matters:

1. The opinion in this case is based upon the assumption that Section 6386, Revised Statutes of Missouri, 1919, is constitutional, and cites the case of State ex rel. Missouri State Life Insurance Co. v. Gehner, 8 S. W. (2d) 1068, 1072, where the same learned writer who wrote the opinion in this case so held. The opinion also expressly applies said section 6386 to this case.

With reference to the provisions of said section 6386 the Court states that it provides that the **net value** of all personal assets **in excess of the legally required reserve** shall be assessed and taxed as the property of individuals. The Court then states:

> "**The section, of course, deals only with property which is subject to taxation.** The question in this case is: how shall the net value of the **taxable assets** be determined?"

The Court then concludes:

> "To put the question concretely: relator's nontaxable assets amount to $94,000.00, its taxable assets to $354,265.33, both are subject to liabilities aggregating $333,486.69—what is the net value of the taxable assets under section 6386? We know of no more equitable way to determine such value than that of apportioning the total liability between the two classes of assets according to their respective amounts and then deducting from the taxable assets the liability so apportioned to that class. Taxable assets are approximately 79.03 per cent of the gross assets; 79.03 per cent of the aggregate liability is in dollars and cents $263,554.53; that sum deducted from the gross value in money of the taxable assets leaves $90,-710.80, their net value. As this sum is greater than that at which relator's personal property was assessed by the Board of Equalization its record should not be quashed."

From the foregoing manner of calculating relator's net assets, the Court's reasoning and conclusions are made up of three propositions: (1) The relator is possessed of nontaxable Government bonds and also taxable assets,

the taxable assets being 79.03 per cent of the gross assets. (2) The relator's legal reserve, as fixed by law, is admittedly $333,486.69, which, the Co t holds, is a liability due the policyholders and charged against all of the relator's assets. 79.03 per cent of such reserve is $263,554.53. (3) Deducting this 79.03 per cent of the reserve, or $263,554.53, from the gross taxable assets, amounting to $354,265.33, leaves $90,710.80, which the Court concludes represents the net taxable assets of the relator.

If we take the method of deducting both the nontaxable assets and the legal reserve from the gross assets, which are $448,265.33, the net assets are $20,778.64. The figure arrived at by the Court in its opinion, $90,710.80, is reached by calculating that the taxable assets represent 79.03 per cent of the legal reserve. In other words, the Court permits the relator to deduct only 79.03 per cent of its reserve, because it owns nontaxable assets aggregating $94,000.00. The sum of $90,710.80 is exactly $69,932.16 more than $20,778.64. The Court could have reached the same result by saying that the relator, having 20.07 per cent of nontaxable assets, must therefore deduct a sum equal to 20.07 per cent from its legal reserve, or the sum of $69,932.16. The Court, in answer to the question, "What is the net value of taxable assets under section 6386?" states:

> "We know of no more equitable way to determine such value than that of apportioning the total liability between the two classes of assets according to their respective amounts and then deducting from the taxable assets the liability so apportioned to that class."

The opinion had just stated, however, that section 6386 **"of course deals only with property which is subject to taxation."** How, then, can the Court read into section 6386 a provision that the legal reserve deductible thereunder does not apply while the Company owns Government bonds or other exempt securities?

Through an unbroken line of decisions in this state taxing statutes are construed strictly in favor of the taxpayer.

State ex rel. v. Hyde, 292 Mo., l. c. 352, 241 S. W. 396;
In re Estate of Clark, 270 Mo. 351, 194 S. W. 54;
State ex rel. v. Lesser, 237 Mo., l. c. 318, 141 S. W. 888.

In State ex rel. Hyde v. Buder, 315 Mo. 791, l. c. 798, 287 S. W., l. c. 309, after holding that Section 6386, R. S. 1919, had not been repealed by other statutes, the Supreme Court en banc said:

> **"To hold that the reserves of a domestic insurance company are proper subjects of taxation would be to ignore the plain terms of the statute which we have just ruled has not been repealed."**

In the following more recent cases the Court en banc held that section 6386 authorized the deduction of the legal reserve of a domestic life insurance company although no nontaxable or exempt assets were involved.

State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1073.

Webster's New International Dictionary defines the word "net" to mean "clear of, or free from, all charges, deductions," etc. The author also states:

> "The lexical definition of 'net' is 'clear of all deductions,' "

and then quotes the Supreme Court of the United States in St. John v. Erie Ry. Co., 22 Wall., l. c. 148, where, after quoting such definition, it is said:

> "The popular acceptance of the term is the same."

We respectfully submit that the opinion constitutes a plain denial of the right given relator by Section 6386, R. S. 1919, to deduct its legal reserve. The statute is plain. The calculation of relator's taxable assets under its return and the statute is a mere problem of subtraction in arithmetic.

We further submit, therefore, that the opinion violates the plain terms of the statute in refusing to permit the relator to deduct the full amount of its reserve, and that in so holding the opinion contravenes Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that no state shall make or enforce any law which shall deprive any person of property with-

out due process of law or deny to any person the equal protection of the laws. The opinion would deprive the relator of its property without due process of law because its taxes are increased beyond the plain terms of the statute by a failure to deduct the full amount of its reserve. It also denies to relator the equal protection of the laws because of the mere circumstance that the relator owns exempt securities, a percentage of its reserve is held to be not deductible, whereas other domestic companies having no Government bonds are permitted to deduct the full amount of such reserve.

II. If Section 6386, R. S. of Mo. 1919, be construed to authorize a full deduction of the reserve in case of domestic life insurance companies having no nontaxable assets, but requires that in case of relator and other companies owning nontaxable securities only a proportionate part of the reserve may be deducted, then such statute is unconstitutional in that it deprives the relator of its property without due process of law and denies to relator the equal protection of the laws, in the manner above stated under point I of this motion. The effect of the opinion is to so hold, and we therefore earnestly contend that in so construing section 6386 the Court would render said section unconstitutional, as aforesaid.

III. On the first page of its opinion herein the Court states that relator's method of determining the net value of its assets "was to deduct from the gross personal assets the aggregate of all liabilities and from **that net value**

to deduct the value of its nontaxable assets; in other words, it first took out of its gross assets all nontaxable assets and then from the remaining taxable assets it deducted the whole of its liabilities."

We do not know that the opinion means to imply that it makes any difference whether relator deducted its legal reserve first or its Government bonds first. We do not see that it would make any difference. As stated on page 5 of our reply brief in this case, there is nothing in this record to show that the Government bonds were invested in the reserve, and that it is immaterial whether they were or not. **The fact remains that there is no uncertainty about the amount of the reserve.** It is fixed by statute (Section 6131, R. S. of Mo. 1919) and by the stipulation of the parties in this case with just as much certainty as the amount of the Government bonds is fixed. The language of section 6386, with reference to the matter under discussion, is that domestic life insurance companies, such as relator, shall make return for taxation: "First, of all the real estate held or controlled by it; second, of the net value of all the other assets or values **in excess of the legally required reserve,** * * * which net values shall be assessed and taxed as the property of individuals."

As heretofore indicated, the Court has held that section 6386 deals only "with property subject to taxation." Instead of adopting the relator's method of deduction of the reserve and exempt securities, by its opinion the Court has held that relator is not entitled to deduct the full

amount of its legal reserve, but that since it owns both nontaxable and taxable assets, and the taxable assets amount to 79.03 per cent of the gross assets, then the relator is entitled to deduct only 79.03 per cent of its reserve, or $263,554.53, whereas, if it had owned no Government bonds, it would have been entitled to deduct the full amount of its reserve, or $333,486.69. The Court has cited no authority to support its conclusion in this matter, and has pointed out no language in section 6386 which authorizes any different method of deduction where the company owns nontaxable assets.

Sections 6115, 6116, 6117, 6126 and 6128, R. S. of Mo. 1919, specifically authorize and contemplate that life insurance companies might invest their assets in United States Government bonds. While the opinion does not give any reason or cite any authority in support of the proposition that relator is not entitled to deduct in full both its Government bonds and its legal reserve, counsel for respondents, in their brief, cite the case of State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2nd) 1057, in support of the proposition that to permit the deduction of both the nontaxable securities and the reserve would amount to a double deduction. The case cited does not so hold, and if it did, for the reasons hereinafter stated it would violate the Federal Constitution, as hereinafter indicated.

But there is not a double deduction. The State of Mis-

souri, neither by section 6386 nor by any other section, authorizes the deduction of Government bonds.

They are **exempt** from taxation because the State of Missouri has no power to tax them. Therefore, when section 6386 authorizes the deduction of the reserve, that is the first and only deduction authorized by the State of Missouri. The fact that the relator in this case is entitled to deduct its Government bonds and also entitled under section 6386 to deduct its reserve does not amount to discrimination or unequal taxation. If there is any inequality in the taxation **it results from the lack of power to tax Government bonds.** Every insurance company has the same right as the relator to purchase Government bonds. As pointed out in State ex rel. Schramm, 271 Mo., l. c. 226-227, the deduction of reserve authorized by section 6386 is not, in fact, an exemption. The Court there said:

> **"Revenue laws sometimes permit taxpayers to deduct from the property to be taxed the debts owing by them. The allowance is not in any sense an exemption, but is made by way of reaching the just amount of taxable property."**

To the same effect is State ex rel. v. Gehner, 8 S. W. (2nd), l. c. 1072.

There is no express provision of the Federal Constitution prohibiting a state from taxing United States bonds. The Constitution does, however, authorize and empower the Government to borrow money and issue bonds. Ever

since the cases of McCulloch v. Maryland, 4 Wheat. 316, and Weston v. City Council of Charleston, 2 Pet. 448, it is the settled law that a state has no power, directly or indirectly, to tax Government securities. In the Weston case (l. c. 469) the Court said:

> **"The tax on Government stock is thought, by this Court, to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."**

In Farmers Bank v. Minnesota, 232 U. S. 516, the question arose as to the power of the State of Minnesota to tax municipal bonds issued by a municipality of the Territory of Oklahoma, which was held to be an instrumentality and agency of the Federal Government. In that case the Court said (l. c. 526):

> "But we deem is entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the Government, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them. * * * The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

"It is on this ground that United States bonds have always been held exempt from taxation under authority of the states."

The taxing law of Minnesota under consideration provided the method of determining the **net taxable assets**, but in such calculation the Government bonds were included in the gross assets. With respect to the effect of this system the Supreme Court of the United States said (l. c. 528):

> "It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the savings bank, computed by taking into the account all of its assets, amounting to about $12,000,000.00, of which the bonds were only about $700,000.00, and deducting therefrom its liabilities. **But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds.** In Bank of Commerce v. New York City, 2 Black 620, it was held that the State of New York, **in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital invested in the stocks, bonds or other securities of the United States not liable to taxation by the state.** And see Bank Tax Case, 2 Wall. 200; Home Savings Bank v. Des Moines, 205 U. S. 503, 509."

To a similar effect is Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136.

The Farmers Bank Case, 232 U. S. 516, was followed by this Court in State ex rel. American Automobile Co. v.

Schramm, 271 Mo. 223, **where it is expressly held that a system arriving at the value of net assets by including tax-exempt Government securities in the gross assets** would result in taxing the Government securities. The Court, quoting from the Farmers Bank Case, 232 U. S., l. c. 528, said that under such a system of taxation **"it is obvious that some portion of the burden is attributable to the ownership of the municipal bonds,"** and the Court concluded:

> "In this case, as in that, the tax is **a state property tax imposed upon a 'surplus' or net assets after deducting certain liabilities. The situation is the same.**"

In the very recent case, National Life Ins. Co. v. United States, 277 U. S. 508, the Supreme Court had before it the act of Congress taxing life insurance companies based upon the sum of all interest, dividends and rents received, less (1) interest derived from exempt securities, (2) a sum equal to 4 per cent of the company's legal reserve, diminished by the amount of interest on exempt securities, and (3) seven other miscellaneous items not pertinent to the issues before the Court. The plaintiff was compelled to pay taxes on its income after deducting the interest received from tax-exempt securities from the 4 per cent deduction guaranteed by section (2). It was contended that the tax was discriminatory and unconstitutional because of requiring the deduction of the amount of interest on tax-exempt securities from the 4 per cent deduction. The Court so held (l. c., pp. 519, 522):

"Petitioner maintains that the result of the Collector's action was unlawfully to discriminate against it and really to exact payment on account of its exempt securities, contrary to the Constitution and laws of the United States. Also that diminution of the ordinary deduction of 4 per cent of the reserve because of interest received from tax-exempt securities, in effect, defeated the exemption guaranteed to their owners.

"The portion of petitioner's income from the three specified sources which Congress had power to tax—its taxable income—was the sum of these items less the interest derived from tax-exempt securities. Because of the receipt of interest from such securities, and to its full extent, pursuing the plan of the statute, the Collector diminished the 4 per cent deduction allowable to those holding no such securities. Thus, he required petitioner to pay more upon its taxable income than could have been demanded had this been derived solely from taxable securities. **If permitted, this would destroy the guaranteed exemption. One may not be subjected to greater burdens upon his taxable property solely because he owns some that is free. No device or form of words can deprive him of the exemption for which he has lawfully contracted.**

* * * * * * *

"**Congress had no power purposely and directly to tax state obligations by refusing to their owners deductions allowed to others.** It had no purpose to subject obligations of the United States to burdens which could not be imposed upon those of a state.

"Considering what has been said, together with the saving clause just quoted, and the manifest general purpose of the statute, **we think that provision of the act which undertook to abate the 4 per cent deduction by the amount of interest received from tax-exempt securities cannot be given effect as against peti-**

tioner under the circumstances here disclosed. It was unlawfully required to pay $92,490.20 and is entitled to recover."

The case of City of Waco v. Amicable Life Ins. Co., 248 S. W. (Tex. Ap.) 332, is cited in support of the opinion of the Supreme Court in National Life Ins. Co. v. U. S., 277 U. S., l. c. 521. That case cannot be distinguished from the case at bar. Texas has a statute authorizing domestic life insurance companies to deduct their reserve from their total assets. The city claimed that the company could not deduct directly its reserve and also tax-exempt Government securities, but the trial court and Court of Civil Appeals held both were deductible. The Commission of Appeals, in affirming the action of the lower court, said (l. c. 333-335):

"We have reached the conclusion that the trial court and the Court of Civil Appeals correctly held that tax-free Government securities cannot be taken into account in estimating the total value of the company's assets. The fallacy in the contentions of the city arises out of treating the reserve as an asset instead of a liability or debt of the company. It may be conceded that if our statutes required the investment of the reserve in a trust fund and exempted that fund from taxation, the securities of the company not so invested would be subject to taxation, and if the company should fail to provide such trust fund and all its assets were mingled, it would not be entitled to a deduction for its tax-free securities except to the extent that they might exceed the total amount required to be invested in its reserve fund. But we have no such question presented here. The reserve of a life

insurance company is not an asset, but a liability. If the amount of that reserve is invested in a trust fund, the fund is, of course, an asset. But even in such case the fund is not exempt from taxation unless expressly so made by statute. * * *

"Nothing, to our mind, could be plainer than that for the purposes of taxation the reserve is treated as a debt or liability, and the deduction allowed is not in any sense the removal of any specific part of the assets of the company from taxation. As stated above, the statute does not require the investment of the amount of the reserve or the setting apart of any of the assets of the company as a trust fund to cover or secure the liability to policyholders represented by the reserve; nor was that procedure actually followed by the complaining company in the present case. Article 4764 does not exempt any fund or assets of the company from taxation as constituting a reserve fund, but, on the contrary, specifically denominates the reserve a debt and authorizes a deduction of that debt from the gross value of the company's property.

"We also think the statute itself eliminated from the gross assets of the company its tax-free Government securities. The statute provides that:

" 'All of the personal property of such insurance companies shall be valued as other property is valued for assessment in this state.'

"When we turn to our statutes governing the assessment of personal property we find that owners are required to list their property with the Assessor under various hearings or items (R. S., Art. 7518). Under subdivision 37 of this article it is provided that this list shall contain 'amount and value of bonds and stocks other than United States bonds.' Thus it will be seen that in the assessment of personal property United States bonds are expressly omitted. * * *

"We have serious doubt whether the Legislature had the power under the method it adopted for as-

sessing the personal property of the company to take into consideration for any purpose the tax-free Government securities. The deduction allowed for the reserve, it is true, was a deduction which the Legislature was not required to make, and in making it the Legislature had, no doubt, the power to reduce the amount of this deduction by offsetting against it the value of any specific property of the company. In other words, the Legislature had the power to limit the deduction to a particular character of the company's assets. For example, we see no reason why the Legislature could not limit the deduction from the total personal assets of the company to the amount by which the reserve might exceed the real estate of the company. But the statute does not provide for the deduction to be made from any particular character of assets. It is general, and taken from the gross. **Under this method the effect of including the tax-free securities in the gross assets necessarily requires the offsetting of those assets against the reserve up to its full amount. It would be impossible, therefore, for the company to obtain the benefit of investing its funds in tax-free securities unless it invested an amount sufficient to cover the reserve and leave a surplus; and in that event it would be benefited by the tax-free character of its securities only to the extent of this surplus. We are strongly inclined to the view that, if the statute be interpreted to require an inclusion of tax-free securities in the gross assets of the company, it would be violative of the United States statutes exempting these securities from taxation.''**

The conclusion seems to us irresistible that since it is unlawful to tax United States bonds, either directly or indirectly, the proposed method of taxation adopted by the Court in its opinion is manifestly contrary to the provi-

sions of the statute, Sections 6481, 6816 and 6825, U. S. Comp. Stat. 1918, denying states and municipalities power to tax Government bonds. The proposed method also violates the due process of law and equal protection of the law clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States. It deprives the relator of its property without due process of law because authorizing a tax on at least some portion of exempt securities in the absence of any valid law authorizing such taxation. It denies to the relator the equal protection of the laws because under the proposed method the relator is denied the right to deduct a portion of its reserve while other companies which do not own Government bonds are allowed the full deduction.

IV. But the proposed method of taxing the relator is not only beyond the power of the state, but amounts to an unlawful discrimination against the relator and other insurance companies who invest their reserve or other assets in Government bonds. As heretofore pointed out, it means that the state says to the relator and other insurance companies: **"If you invest your reserve in Government bonds, we will refuse to grant you the right to deduct your reserve."** This indirectly means: **"If you invest your assets in Government bonds we will tax them."**

In Miller v. Milwaukee, 272 U. S. 713, the plaintiff owned shares of stock in a corporation. A law of Wisconsin provided that corporations should be assessed on their income, after deducting interest on United States bonds. The interest on the United States bonds, of course, was

credited to the surplus of the corporation. But the exemption was met by the State of Wisconsin by a provision that while the stockholders were not taxed upon dividends received from corporations, the income of which was assessed, **yet if only part of the income of the corporation was assessed, only a corresponding part of the dividends or income received therefrom should be deducted from the income taxed to the stockholders.**

In holding an assessment under such law invalid, the Supreme Court of the United States said (l. c. 715):

> "It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. **If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good.** Under the laws of Wisconsin the income from the United States bonds may not be the only item exempted from the income tax on corporations, but it certainly is the most conspicuous instance of exemption at the present time. **A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act. On that assumption the immunity of the national bonds is too important to allow any narrowing beyond what the acts of Congress permits. We think it would be going too far to say that they allow an intentional interference that is only prevented from being direct by the artificial distinction between a corporation and its members.**"

In Supervisors v. Stanley, 105 U. S. 305, the Supreme Court had before it a statute of New York which authorized assessments against shareholders in national banks without permitting the owners to deduct their just debts from the value thereof. The federal statute then provided that persons having money invested in stocks in national banks would be assessed at no higher rate than persons whose property was invested in other monied capital in the state. Another statute of New York permitted owners of personal property, other than shares in national banks, to deduct their just debts from the value thereof. The plaintiff owned shares of stock in a national bank and was compelled to pay taxes thereon without being allowed to deduct his just debts. He sued to recover the tax, and the Supreme Court held that the tax was void and that plaintiff was entitled to recover because of unlawful discrimination against owners of stock in national banks.

So, in this case, it is sought to tax the relator on its personal property without deducting its reserve, merely because it owns Government bonds, whereas other insurance companies who may not own Government bonds are given the right under Section 6386, Revised Statutes 1919, to deduct the full amount of their reserve.

In Knox, Attorney-General, v. Southern Paper Co., 108 So. (Miss.) 288, the Court had before it an assessment of personal property against the defendant, which was claimed to be a violation of Section 112 of the Constitution of the State of Missouri requiring that taxation "must be uni-

form and equal throughout the state and property taxed in proportion to its value." The Court said (l. c. 290):

> **"But under the equality clause of the Fourteenth Amendment of the Federal Constitution as construed by the Supreme Court of the United States, if in assessing property for taxes either the requirement that it be assessed at its true value, or the requirement that its assessment shall be uniform and equal, is sacrificed, it must be the former and not the latter."**

In Buist v. Charleston, 57 S. E. (S. C.) 862, the City of Charleston, under authority of an act of the Legislature, issued refunding bonds which were by the provisions of said act made exempt from taxation. It was sought to enjoin the issuance of the bonds on the ground that the exemption of the bonds resulted in unequal taxation, because those holding no bonds were required to pay higher taxes than those who owned bonds. The Court disposed of this objection by saying (l. c. 867):

> **"The objection stated in the eighth paragraph of the petition must be overruled, as such result is incidental to all exemptions of property from taxation. No case has been cited to show that such objection has ever rendered a statute unconstitutional."**

It follows, therefore, that when the Court, by its opinion, deducts a part of the reserve because the relator owns Government bonds, it unlawfully discriminates against companies investing their assets in Government bonds. This is true, whether we regard the opinion as refusing to

allow the deduction authorized by the plain terms of section 6386, or whether we consider the opinion as construing section 6386 as authorizing the method of calculation adopted by the Court. Such discrimination is unlawful, and in violation of the equal protection of the laws clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

For all of the foregoing reasons we earnestly contend that the proposed method of taxation is illegal and that a rehearing should be granted herein.

Respectfully submitted,

Jones, Hocker, Sullivan & Angert,
Attorneys for Relator.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator,

Appellant,

vs.

FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis, A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis,

Appellees.

No. 222.

STATEMENT IN OPPOSITION TO JURISDICTION ON APPEAL.

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OLIVER SENTI,
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IN THE

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STATEMENT IN OPPOSITION TO JURISDICTION ON APPEAL.

May It Please the Court:

The appellee, in opposition to the jurisdiction of this Court to review the above-entitled cause on appeal, respectfully submits:

A.

NATURE OF CASE AND RULING BELOW.

The appellant is an insurance company organized under the laws of Missouri. Under the general laws of the state, Section 12766, R. S. Mo. 1919, as amended, Laws of 1923, page 275, all taxable property which a person owns, possesses, manages or controls must be returned for taxation. Section 6386, Revised Statutes of Missouri 1919, however, permits domestic insurance companies to make a return different from that required of individuals and other corporations. It provides:

> "Sec. 6386. **Home Companies Subject to What Tax.** —The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals."

The company made its return, which showed its assets and the deductions it claimed under section 6386, as follows.

Total Assets		$590,265.33
Government Bonds (exempt).....		94,000.00
		$496,265.33
Statutory deductions:		
Real estate	$142,000.00	
Legal reserve	326,522.69	
Unpaid policy claims....	6,964.00	$475,486.69
		$ 20,778.64

The Assessor and the Board of Equalization, to whom the company appealed, assuming that section 6386 was invalid, disallowed the deductions the company claimed under it and assessed its personal property at $50,000.

The Court upheld appellant's contention that the statute is valid, construing it as applying only to **taxable** property and as permitting domestic insurance companies to deduct from their **taxable** property returned their real estate (taxed as other property) and that portion of their legal reserve and unpaid policy claims which consists of **taxable** property . It also held that the company's legal reserve and unpaid policy claims ($333,486) was a charge upon the whole of its assets, 84 per cent of which assets consisted of **taxable** property; that, therefore, 84 per cent of its legal reserve and unpaid policy claims ($280,122.81) likewise consisted of **taxable** property, and, under the statute, was deductible from its **taxable** personal property—

that is, from its **taxable** assets after deducting its real estate, which is taxed as other property (Opinion below).*

The company below was not in a position to complain of the action of the Court in sustaining the validity of the statute, because, if invalid, it could have been taxed on the whole of its assets, excepting its Government bonds. In its motion for a rehearing it asserted that, in construing the statute so that it could not also deduct from its **taxable** property that part of its reserve and unpaid policy claims which consist of nontaxable property, its rights under the Federal Constitution and laws were violated.

B.

STATUTORY PROVISIONS RELATING TO JURISDICTION.

An appeal in this case is sought from the Supreme Court of Missouri, on the theory that, prior to the enactment of the Act of January 31, 1928, as amended by Act of April 26, 1928, appellant would have been entitled to a writ of error to the Supreme Court of Missouri. In support of this Court's jurisdiction appellant cites that part of Section 237 of the Judicial Code, as amended, being Section 344, Title 28, U. S. Code, Ann., which provides:

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the

*The uncertified transcript has already been filed and the record has not yet been printed. All references are made to the opinion below, as we have no means of obtaining the pages of the transcript.

> suit could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

On page 5 of its statement as to jurisdiction on appeal, appellant enumerates the grounds on which, in its motion for a rehearing, it was claimed that the construction placed upon the statute by the Supreme Court of Missouri violates the Constitution and statutes of the United States, and, on the following page, says:

> "In other words, it was contended by relator that the construction and application of section 6386 by the Supreme Court of Missouri, as applied to domestic insurance companies owning Government bonds, made such section repugnant to the constitutional provisions aforesaid and to the statute of the United States exempting Government bonds from taxation."

The Supreme Court of Missouri was cited to the principles set forth in the following decisions on what appellant asserts are similar questions:

> Farmers Bank v. Minnesota, 232 U. S. 516;
> Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136;
> National Life Ins. Co. v. United States, 277 U. S. 508;
> Miller v. Milwaukee, 272 U. S. 713;

Supervisors v. Stanley, 105 U. S. 305;
McCulloch v. Maryland, 4 Wheat. 316;
Weston v. Charleston, 2 Pet. 448.

These cases may be distinguished in that the statute involved in each of them contemplates the imposition of a tax, either directly or indirectly, on the taxpayer's property, even if the whole of such property is in obligations of the United States, while in the case made by the record here the operation of the statute cannot have that effect.

C.

CASES RELIED ON BY APPELLANT FOR JURISDICTION.

Under subdivision D the appellant cites the following decisions in support of jurisdiction on appeal:

Great Northern Ry. Co. v. Minnesota, 278 U. S. 503, 49 S. Ct. R. 191;
Nashville, C. & St. L. Ry. v. White, 278 U. S. 456, 49 S. Ct. R. 189;
New York v. Zimmerman, 278 U. S. 63, 49 S. Ct. R. 61;
Fox River Paper Co. v. R. R. Com. of Wisconsin, 274 U. S. 651, 47 S. Ct. R. 669;
Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 47 S. Ct. R. 179.

In all of these cases the validity of a statute was drawn into question, on the ground that it was repugnant to the Constitution or laws of the United States. They are distinguished from the present case in that here the taxing officials claimed the statute was void and undertook to assess the company's property under the general law for a higher amount (Opinion below), while the company based its right to certain deductions on the statute.

The state court held the statute valid and construed it as applying only to **taxable** property. On the basis of this construction the Court upheld the action of the Board of Equalization, which, for the purpose of taxation, placed a valuation of $50,000 on the company's personal property, which personal property it was within the power of the State to tax on a value in excess of $354,000—the total assets, less real estate and tax-exempt bonds. Appellant's right to deduct from its **taxable** property returned **any** part of its legal reserve and unpaid policy claims is not a privilege or immunity conferred upon it by the Constitution or laws of the United States, but rests upon Section 6386, R. S. Mo. 1919, or does not exist. Under its previous decision (State ex rel. American Automobile Ins. Co. v. Gehner, 8 [2nd] S. W. 1057, l. c. 1059) the state court could only construe section 6386 as it did, or hold it to be violative of the State Constitution. To have so construed the statute as to render it unconstitutional would have deprived the company of all of its tax-

able assets, leaving all of its property, except its tax-exempt Government bonds, subject to taxation.

On the facts disclosed by the record we contend that the appellant is not only not entitled to an appeal, but that it is not even entitled to this Court's discretionary writ of certiorari.

Respectfully submitted,

JULIUS T. MUENCH,
City Counselor,
OLIVER SENTI,
First Associate City Counselor,
Attorneys for Appellees.

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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator, Appellant,

vs.

FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis, Appellees.

No. 222.

BRIEF IN OPPOSITION TO ISSUANCE OF THE WRIT OF CERTIORARI.

JULIUS T. MUENCH,
City Counselor,
OLIVER SENTI,
First Associate City Counselor,
Counsel for Appellees.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator, Appellant, vs. FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis, Appellees.	No. 222.

BRIEF IN OPPOSITION TO ISSUANCE OF THE WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

Appellant's statement under this title, at page 17 of its brief, is adopted by the appellees.

II.

Jurisdiction.

(a) **Statutory provisions relating to jurisdiction.**

It is admitted that the several statutory provisions relating to certiorari are correctly set out in paragraph (a) of subdivision II of appellant's brief.

Section 8 (a) of the act of Congress of February 13, 1925 (43 Stat. L. 936; U. S. Code, Title 28, Sec. 350), which appellant has not set out, in part provides:

> "That no * * * writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review, shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

(b) **Date of decree and application for appeal.**

Appellant's petition for certiorari was not filed within three months after final judgment, as required by Section 8 (a) of the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 350).

The motion for rehearing of the appellant as relator below was overruled and the modified opinion of the Supreme Court of Missouri, which is the final decree, was entered on March 27, 1929 (Tr., p. 62). The petition for appeal herein was presented to the Chief Justice of the Supreme Court of Missouri on June 24, 1929, within three

months after the date of the overruling of relator's motion for rehearing, and the appeal was allowed on said June 24, 1929 (Tr., pp. 76, 77).

After the docketing of the appeal herein in this court appellant's petition for certiorari was filed, on the papers on which the appeal was granted and the transcript herein.

(c) **Nature of the ruling below.**

Sections 6 and 7 of Article X of the Constitution of Missouri are as follows:

> "Sec. 6. **Property exempt from taxation.**—The property, real and personal, of the state, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also such property, real or personal, as may be used exclusively for agricultural or horticultural societies: **Provided,** That such exemptions shall be only by general law.
>
> "Sec. 7. **Other exemptions void.**—All laws exempting property from taxation, other than the property above enumerated, shall be void."

The general law of the state governing the return and assessment of property for taxation (Section 12766, Re-

vised Statutes of Missouri 1919, as amended, Laws of Missouri 1923, page 275), so far as here material, provides:

> "Sec. 12766. The Assessor * * * shall * * * proceed to take a list of the taxable personal property in his county, town or district and assess the value thereof in the manner following, to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such person to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise, which may be required to pay a license tax, being in any county of this state, in accordance with the provisions of this chapter; and the person listing the property shall enter a true and correct statement of such property on a printed or written blank prepared for that purpose * * *."

Section 6386, Revised Statutes of Missouri 1919, the construction of which by the State Court appellant seeks to have reviewed on certiorari, so far as pertinent, reads:

> "Sec. 6386. **Home Companies Subject to What Tax.**—The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve neces-

sary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals."

After referring to the provisions of this section, the court below, at the point indicated by the asterisks in the excerpt from the opinion set out at page 21 of appellant's brief, said:

"Relator claims, inferentially, that it has invested its surplus in United States bonds, nontaxable assets, and that it has put its legal reserve and working capital into other securities, which are subject to taxation; and that therefore the reserve and all other liabilities should be deducted from the taxable assets alone. But surplus, earnings, undivided profits, etc., are mere bookkeeping terms. The legal reserve is not a segregated fund; it is a measure of liability, a test of solvency; the amount that would be required to make a present settlement with all of relator's policyholders, or to reinsure its risks; it is an indebtedness (State ex rel. Missouri State Life Ins. Co. v. Gehner [Mo. Sup.], 8 S. W. [2d] 1068, 1072). And relator's indebtedness, legal reserve and unpaid policy claims, is a charge against all of its assets, both taxable and nontaxable.

"To put the question concretely: Relator's nontaxable assets amount to $94,000.00, its taxable assets to $590,265.33 (real, $142,000.00; personal, $354,265.33), both are subject to liabilities aggregating $333,486.69 —what is the net value of the taxable personal assets under section 6386? (15 S. W. [2d], l. c. 535) (Tr., pp. 38 to 40).

The Supreme Court of Missouri, in State ex rel. Gehner, 8 (2d) S. W. 1057, l. c. 1059, as we interpret that decision, held that, if so construed as to permit a domestic insurance company to deduct all of its reserve and unpaid policy claims from its taxable assets, section 6386 is unconstitutional.

(d) **Certiorari is discretionary and should be denied.**

Certiorari is not a writ of right, but its issuance is discretionary.

> Ireland v. Woods, 246 U. S. 323, l. c. 328;
> Twitchell v. Pennsylvania, 7 Wall. 321;
> Philadelphia & R. Coal & Ice Co. v. Gilbert, 245 U. S. 162.

Appellant's right to deduct from its **taxable** property return **any** part of its legal reserve or unpaid policy claims rests upon Section 6386, R. S. Mo. 1919, or does not exist.

The Missouri Supreme Court, in State ex rel. v. Gehner, supra, has held that, if so construed as to permit Appellant to deduct all of its reserve and unpaid policy claims from its **taxable** assets, section 6386 is unconstitutional. In that event the appellant must, in accordance with the requirements of Section 12766, R. S. Mo., return for taxation the whole of its taxable personal property, which (Appellant's Brief, p. 3) consists of money deposited in bank or other safe place, $5,265, and bonds of state, county, town, city, township, incorporated or unincorporated companies of the value of $255,000.

SUMMARY OF ARGUMENT.

I.

Effect of Statute as Construed by State Court.

Section 6386, Revised Statutes of Missouri, 1919, imposes a tax on the net assets of domestic insurance companies.

State ex rel. v. Schramm, 271 Mo. 223.

As construed by the court below, appellant s taxable and nontaxable assets are apportioned between its liabilities and its net assets, and the tax on the latter is calculated by excluding that part thereof which consists of Government bonds.

To construe the statute otherwise would be to render it unconstitutional.

State ex rel. American Automobile Insurance Co. v. Gehner, 8 (2d) S. W. 1057, l. c. 1059.

If Section 6386 is so construed as to violate the State Constitution it is a nullity, and the whole of relator's property, except its Government bonds, is taxable under the general laws of the State.

Section 12766, R. S. Mo. 1919.

II.

Missouri Decisions Relied on by Appellant.

The decisions of the Missouri Supreme Court cited by the appellant in support of its contention that, under the laws

of Missouri, domestic insurance companies having no Government bonds are permitted to deduct the whole of their legal reserve from their tax return, do not hold that the net assets of a domestic insurance company shall, for the purpose of taxation, be computed otherwise than by deducting its taxable reserve from its taxable assets.

III.

Federal Decisions Relied Upon by Appellant.

The appellant cites numerous federal decisions holding that any method of calculation of assets which directly or indirectly results in the taxation of Government bonds violates the Federal Constitution.

The cases cited are not decisive, because they involve statutes which contemplate the imposition of a tax either directly or indirectly upon the obligations of the Federal Government, while section 6386, as construed below, does no more than to tax the net assets of domestic insurance companies calculated by excluding that part of the net assets which consists of Government bonds.

ARGUMENT.

I.

Practical Effect of the Statute as Construed by the State Court.

It cannot be disputed that it is beyond the power of the states to impose a tax on securities of the United States. The question which this Court must ultimately determine, then, is, whether in point of fact the State has taxed Government bonds belonging to the appellant. The first useful step in the solution of this question, as this Court in Home Savings Bank v. Des Moines, 205 U. S. 503, l. c. 510, has heretofore said, is to ascertain with precision (a) the nature of the tax in controversy, (b) upon what property it was levied and (c) that step must be taken by an examination of the taxing law as interpreted by the Supreme Court of the state.

(a) The nature of the tax assessed pursuant to Section 6386, R. S. Mo. 1919, is definitely established as a tax on the net assets of domestic insurance companies. In State ex rel. Schramm, 271 Mo. 223, the Court, in speaking of what is now section 6386, l. c. 226, said:

> "The statute (Sec. 7098) prescribes a system of taxation and net assets."

(b) The language quoted also definitely determines that the tax is one levied upon the net assets of domestic insurance companies.

(c) An examination of the taxing law as interpreted by the Supreme Court of the state, in order to appreciate the reasoning and measure the correctness of the opinion below, we think necessarily involves an examination of previous decisions of the Supreme Court of Missouri; also certain provisions of the Constitution of the State.

In State ex rel. v. Schramm, supra, it was decided, as we show at page 9, that what is now section 6386 prescribes a system of taxation of the net assets of domestic insurance companies.

The Constitution of the state, by sections 6 and 7 of article X (set out at page 3), provides that all laws exempting from taxation property other than that of the state, counties or municipalities, cemeteries and property used for religious or educational or purely charitable purposes, or for the purposes of agricultural or horticultural societies, shall be void.

Having in mind this provision of the State Constitution, the Supreme Court of Missouri, in State ex rel. American Automobile Insurance Company v. Gehner, 8 (2d) S. W. 1057, in effect, held that to construe section 6386 so as to permit a domestic insurance company to deduct the whole of its reserve from its taxable assets would not only defeat the purpose of the statute, but would defeat the policy of the state to maintain equality of taxation in accordance with the demands of the Constitution.

Practically all of the states treat the legal reserve of an insurance company as belonging to its policyholders,

and have enacted regulatory laws designed to keep intact the legal reserve necessary to reinsure outstanding risks. This policy is also reflected in the tax laws of many states, and insurance companies, instead of being required, like other corporations and individuals, to return for assessment all property which they own or which is in their possession or under their control, are taxed only upon their net assets. The principle underlying the method by which the amount of the net assets is determined is the deduction from the gross assets of the liabilities (the reserve) which in fact belongs to the policyholders. In accordance with this policy, the Legislature of Missouri enacted section 6386 to relieve domestic insurance companies from paying taxes on any property except their net assets.

The assets of the Missouri Insurance Company consist of:

Real Estate	$142,000.00	
Government Bonds	94,000.00	
Taxable Personal Property	354,265.33	
Total	$590,265.33	
Its liabilities, consisting of Legal Reserve and Unpaid Policy Claims are		$333,486.00
		(Opinion below.)

The Court below, knowing that the statute violated the State Constitution if construed so as to permit the company to deduct from its taxable assets that part of its liabilities consisting of property which it is beyond the power of the state to tax, apportioned its taxable and

nontaxable property to its liabilities and to its net assets; found that the company's taxable assets are approximately 84 per cent of its gross assets; that 84 per cent or $280,128.81 of its liabilities (legal reserve and unpaid policy claims) consisted of taxable property; and that the company was authorized by the statute to deduct that amount from its taxable assets.

The effect of this ruling was to permit the appellant to deduct from its return all that the Legislature could authorize it to deduct without violating the State Constitution.

Its effect was also to permit appellant to deduct from its return that part of its reserve which is invested in taxable personal property and which it was within the power of the state to tax without violating either the State Constitution or the Federal Constitution or laws.

The construction placed upon the statute below is the only means by which the state court could give appellant the benefit of the policy of the state to relieve domestic insurance companies from the payment of taxes on property in which they have that part of their assets representing their legal reserve and unpaid policy claims (liabilities) invested, and which in fact belongs to their policyholders. This, we think, is apparent when the different classes of the company's assets are allocated to the respective funds which the state court regards as liabilities belonging to the policyholders and as net assets belonging to the company.

The legal reserve and unpaid policy claims (liabilities) aggregate $333,486.00, which represents approximately 56.5 per cent of the total assets; the remaining (approximately) 43.5 per cent represents the net assets, the taxation of which is the purpose of the statute.

The different classes of property of which the assets consist when apportioned on this basis between the liabilities (reserve and unpaid claims) and the net assets are as follows:

	Liabilities 56.5%	Net Assets 43.5%	Total
Government Bonds	$ 53,110	$ 40,890	$ 94,000
Real Estate	80,230	61,770	142,000
Taxable Personal Property	200,160	154,105	354,265
	$333,500	$256,765	$590,265

Under the statute the real estate is taxed as other property. Hence the company, in deducting its real estate from the aggregate amount of its net assets, as the statute authorizes it to do, in computing the amount of its taxable net assets, is entitled to deduct not only the $61,770.00 allocated to its net assets, but also the $80,230.00 allocated to its liabilities, or a total of $142,000.00. It is also entitled to exemption on the Government bonds ($40,890.00) of which the net assets in part consist. The net value of its personal property for the purpose of taxation, then, is computed as follows:

Total Net Assets		$256,765.00
Government Bonds Exempt	$ 40,890	
Real Estate (taxed as other property	142,000	182,890.00
Taxable Net Assets		$ 73,875.00

This varies slightly from the amount which the Court below found the company might have been assessed, because, in both computations, approximate percentages were used, decimals not being carried out. The variation, however, is immaterial, as the assessment made by the taxing authorities, and which the appellant seeks to have quashed, is only $50,000.00.

II.

Missouri Decisions Relied on by Appellant.

In State ex rel. v. Schramm, 271 Mo. 223, 196 S. W. 21, cited by appellant, the taxing officials assessed the American Automobile Insurance Company on its total assets, including Government bonds, less its legal reserve. In this case, the appellant is only being assessed on its **taxable** assets, less the **taxable** portion of its reserve.

On page 40 of its brief, appellant, for the purpose of showing it is the law of Missouri that, under section 6386, a domestic insurance company having no tax-exempt securities may deduct its entire reserve, cites:

> State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2) 1057;

State ex rel. Citizens' Ins. Co. v. Gehner, 8 S. W. (2d) 1066;
State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067;
State ex rel. International Life Ins. Co. v. Gehner, 8 S. W. (2d) 1067;
State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1073.

None of these cases hold that a domestic insurance company having no tax-exempt securities can compute its assets for the purpose of taxation under section 6386 otherwise than by deducting its taxable reserve from its taxable assets, and that is the method by which the court below held that appellant's net assets should be computed.

III.

Federal Decisions Relied Upon by the Appellant.

The appellant asserts that, under the provisions of the Federal Constitution and statutes, this Court has uniformly held that any method of taxation or calculation of assets which directly or indirectly results in the taxation of Government securities, in whatever form, is beyond the power of the several states and the municipalities of the several states, citing:

Farmers Bank v. Minnesota, 232 U. S. 516;
Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136;
Miller v. Milwaukee, 272 U. S. 713;
Supervisors v. Stanley, 105 U. S. 305;
National Life Ins. Co. v. United States, 277 U. S. 508.

In our statement in opposition to jurisdiction on appeal, at page 6, we pointed out that these cases may be distinguished, in that the statute involved in each of them contemplates the imposition of a tax either directly or indirectly on the taxpayer's property, even if the whole of such property is in obligations of the United States; while in the case made by the record here the operation of the statute does not have that effect. We have endeavored, at page 13 hereof, to make this distinction clear, by showing that section 6386 does no more than impose a tax on the net assets of the appellee, calculated by excluding that part of the net assets which consist of Government bonds.

Home Insurance Company v. New York, 134 U. S., l. c. 598, also cited by appellant in support of this proposition, involved the validity of a corporation franchise tax imposed by the state and measured by the amount of the dividends on the capital stock of the corporation, a part of which capital stock was invested in Government bonds, and the Court, after referring to McCulloch v. Maryland, 17 U. S. 4 Wheat. 436; Weston v. Charleston, 27 U. S. 2

Pet. 449, and Brown v. Maryland, 25 U. S. 12 Wheat. 418, l. c. 599, said:

> "Looking now at the tax in this case upon the plaintiff in error, we are unable to perceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it a tax upon the 'corporate franchise or business' of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year."

Continuing, the Court (l. c. 600) quoted from the Delaware Railroad Tax Case, 85 U. S. 18 Wall. 206, as follows:

> "The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

The case not only does not support the appellee's contention, but tends to sustain the right of the states to do what Section 6386, R. S. Mo. 1919, as construed by the court below, does, to wit, impose a tax on the net assets of domestic insurance companies while in no sense imposing a tax on that part of the net assets consisting of Government bonds.

Appellant also cited Home Savings Bank v. Des Moines, 205 U. S. 503. The statute before the Court in that case provided that shares of stock in state and savings banks and the loan and trust companies should be assessed to such companies and not to individual shareholders. The Home Savings Bank owned United States bonds, which the taxing authorities refused to deduct in computing the value of the shares. The issue in that case bears no resemblance whatever to the question here. The net assets of the bank, including its United States bonds, were taxed, while, in the present case, the tax is on only that part of the net assets of the company which remains after deducting such of the net assets as consist of United States bonds.

Conclusion.

We submit that it follows from the foregoing discussion that Section 6386, R. S. Mo. 1919, as construed below, does not destroy the exemption from taxation granted to owners of Government bonds; that the statute merely imposes a tax on the net assets of domestic insurance com-

panies, except so much thereof as consist of tax-exempt securities; that appellant's right to deduct from its taxable property returned, any part of its liabilities, is not a privilege or immunity conferred by the Constitution or laws of the United States, but rests upon the state statute, or does not exist; that, if the statute is construed as appellant contends, it is a nullity, and the whole of appellant's taxable personal property, amounting to $354,265, is subject to taxation under Section 12766, R. S. Mo. 1919, which is set out at page 4; that the statute as construed below, instead of depriving appellant of its property without due process of law, or denying it the equal protection of the law, gives it immunity from taxation on all of its personal property except $74,136.52, although the same property might be assessed at $354,265 without violating either the State Constitution or the Federal Constitution or laws; and that, as construed by the Supreme Court of Missouri, the statute deprives the appellant of no right under the Constitution and laws of the United States, for the protection of which it is entitled to this Court's writ of certiorari.

Respectfully submitted,

JULIUS T. MUENCH,
City Counselor,
OLIVER SENTI,
First Associate City Counselor,
Counsel for Appellees.

In appellees' printed statement in opposition to jurisdiction on appeal, heretofore filed, the words "deductions from its" were inadvertently omitted after the word "its" in the last line on page 7. The sentence should read:

"To have so construed the statute as to render it unconstitutional would have deprived the company of all of its deductions from its taxable assets, leaving all of its property, except its tax-exempt Government bonds, subject to taxation."

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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator, Appellant (Petitioner),

v.

FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis, Appellees (Respondents).

No. 222.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEES (RESPONDENTS).

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator, Appellant (Petitioner), v. FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis, Appellees (Respondents).	No. 222.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEES (RESPONDENTS).

STATEMENT.

Appellant, a Missouri corporation, is a life and accident insurance company. The appellees are the Assessor and President and Members of the Board of Equalization of St. Louis.

The company's tax return (Tr., p. 7) listed its assets as follows:

Real estate	$142,000.00
Bonds, municipal	289,000.00
Bonds, government	94,000.00
Mortgages	60,000.00
Cash	5,265.33
Total	$590,265.33

Classified as real estate, taxable personal property and nontaxable personal property, its assets consist of:

Real estate	$142,000.00
Taxable personal property	354,265.33
Nontaxable personal property	94,000.00
Total	$590,265.33

Its liabilities, as stated in the return (Tr., p. 8) are:

Legal reserve	$326,522.00
Unpaid policy claims (sick)	5,143.00
Unpaid policy claims (death)	1,821.00
Total	$333,486.00

The general law of the state, Section 12766, R. S. Mo. 1919, governing the return and assessment of property for taxation, provides that the taxpayer shall list all taxable property owned by him, or under his custody or control, with its value.

Appellant's property, if owned by an individual residing in the State of Missouri or by an ordinary Missouri corporation, would, under the general tax law of the state, be assessed for taxation as follows:

Real estate	$142,000.00
Taxable personal property	354,265.00
	$496,265.00

Section 6386, R. S. Mo. 1919, which governs the assessment and taxation of a domestic insurance company, requires it to return for taxation (1) all the real estate held or controlled by it; (2) the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals.

The pertinent parts of section 12766, section 6386, and certain provisions of the Constitution of the state which are mentioned in the argument, are set out in the appendix.

The company deducted the whole of its liabilities—legal reserve and unpaid policy claims—from its taxable property, to determine the amount of its taxable assets, and took credit for its real estate on which it was separately assessed, thus:

Total assets		$590,265.33
Government bonds, exempt		94,000.00
Taxable assets		$496,265.33
Real estate		142,000.00
		$354,265.33
Less:		
Reserve	$326,522.69	
Unpaid policy claims	6,964.00	333,486.69
		$ 20,778.64

The Board of Equalization, being of the opinion that section 6386 was unconstitutional, disallowed the deduction of the legal reserve and unpaid policy claims, and assessed the Company's real estate at $142,000.00 and its personal property at $50,000.00 (Tr., p. 15).

The Company then instituted this proceeding in certiorari in the Supreme Court of Missouri to quash the record of the assessment on its personal property in excess of $20,778.64.

While this cause was pending below, the constitutionality of section 6386 was upheld in other suits (Appellant's Brief, p. 5). The Board of Equalization conceding, then, that the statute is constitutional, contended that it authorized the assessment which was imposed upon the Company's net assets. The basis of this contention was that approximately 84 per cent of the Company's total assets were taxable, and, as there was no physical segrega-

tion of the funds representing its legal reserve and unpaid policy claims (liabilities) and the funds representing its net assets, its taxable property should be apportioned to those two funds in the ratio of their respective amounts, and that the taxable property so apportioned to the net assets should be assessed for taxation.

The Court below (Tr., p. 17) construed the statute as authorizing the Assessor to arrive at the taxable value of the Company's personal property in the following manner, to wit: allow it an exemption of $94,000.00 on its government bonds ($590,265.33—$94,000.00=$496,265.33); deduct the real estate on which it is taxed ($496,265.33—$142,000.00=$354,265.33); apply the ratio of taxable property, that is, 84 per cent, to the legal reserve and unpaid policy claims (84 per cent of $333,486.69=$280,128.81), and deduct this amount from the taxable personal property ($354,265.33—$280,128.81=$74,136.52).

As so computed, the value of the Company's taxable personal property was more than the assessment of $50,000.00 imposed by the Board of Education, and the Court below therefore refused to quash the assessment.

The Company's legal reserve and unpaid policy claims (liabilities) amount in the aggregate to $333,486.00 (Tr., p. 7), which represents approximately 56.5 per cent of its total assets. The remaining (approximately 43.5 per cent) of its total assets represents the net assets, taxation of which is provided for by the statute.

The different classes of property of which the assets consist, as indicated by the Company's return (Tr., p. 7), when apportioned between the legal reserve and unpaid policy claims (liabilities) and the net assets, are as follows:

	Liabilities 56.5%	Net Assets	Total
Government bonds	$ 53,110.00	$ 40,890.00	$ 94,000.00
Real estate	80,230.00	61,770.00	142,000.00
Taxable personal property	200,160.00	154,105.00	354,265.00
	$333,500.00	$256,765.00	$590,265.00

The Company has paid, or will be required to pay, taxes on the $80,230.00 of real estate allocated to its liabilities, as well as $61,770.00 allocated to its net assets. In computing the assessment on its net assets, the Company is therefore entitled to credit for $142,000.00 assessed against its real estate. The value of the balance of its net assets (taxable as personal property), therefore, is:

Total net assets		$256,765.00
Government bonds exempt	$ 40,890	
Real estate (taxed as other property)	142,000	182,890.00
Taxable net assets		$ 73,875.00

The appellant assigns as error and as a basis of federal jurisdiction (Tr., pp. 26, 27, 28) that the construction

placed upon the statute by the state court violates its rights under the due process and equal protection clauses of the Fourteenth Amendment.

The appellees contend that it is within the power of the state to tax all of appellant's assets except the $94,000.00 invested in Government bonds; that how the statute shall be construed is a matter of state law, so long as the construction adopted does not burden appellant's property with a greater tax than is imposed on the property of others, and does not, in fact, impose a tax on property which it is beyond the power of the state to tax; that, so construing the statute that appellant's taxes are computed by apportioning its taxable property between its liabilities and its net assets does not violate appellant's rights under the Constitution or laws of the United States; that the appellant's right to deduct any part of its liabilities from its tax return is derived from the state statute, or does not exist; and that, if the statute as construed by the state court violates the Constitution or laws of the United States, it is unconstitutional, and all of appellant's property, except its Government bonds, are taxable under the laws of the state.

BRIEF.

I.

(a) The nature of a tax, and the property upon which it is levied, are important elements in determining its validity.

(b) Section 6386, R. S. Mo. 1919, provides a system of taxation of the net assets of domestic insurance companies.

State ex rel. v. Schramm, 271 Mo. 223.

(c) A Missouri insurance company is required to return for taxation its real estate and all other assets in excess of its legally required reserve and unpaid policy claims.

Sec. 6386, R. S. Mo. 1919.

(d) Section 6386, as construed by the court below, in effect authorizes the Assessor to allocate a fair amount of the nontaxable securities of an insurance company to its net assets, and to assess the net assets as the property of an individual.

Opinion below (Tr., p. 17).

Where the same result is obtained by either of two methods it is immaterial which is adopted.

Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530.

(e) It is the judgment and not the opinion of the lower court that is reviewed by an appellate court, and the judgment, if correct, ought not to be reversed, even if the appellate court does not agree with the reasoning on which it is based.

4 C. J. 1080, Note 95;
M'Clung v. Silliman, 6 Wheat. 598, 5 L. ed. 340.

II.

(a) Section 6386, as construed below, does not deny tax exemption to Government bonds.

(b) The statute, as construed below, allocates a fair proportion of appellant's Government bonds to its net assets and imposes an assessment only on its taxable net assets.

Opinion below (Tr., p. 17).

(c) The Government bonds allocated to the reserve and unpaid policy claims are not taxed.

(d) The language of an opinion is not necessarily controlling on an issue not before the Court when it was used.

Pacific Steamship Co. v. Peterson, 278 U. S. 130.

III.

(a) Appellant, in making its tax return, has no right under the Constitution or laws of the United States to apportion all of its Government bonds to its net assets.

(b) The decision of the Supreme Court of Missouri denying the appellant the right, in making its tax return, to apportion all of its Government bonds to its net assets does not violate appellant's right under the due-process clause or the equal-protection clause of the Fourteenth Amendment.

(c) The record presents only one question, to wit: Does the decision of the state court violate appellant's right, under the Constitution and laws of the United States, by denying it the right, in making its tax return pursuant to section 6386, to apportion all of its Government bonds to its net assets?

(d) Section 6386, if so construed as to permit an insurance company, in making its return, to apportion all of its Government bonds to its net assets is unconstitutional.

> State ex rel. American Automobile Ins. Co. v. Gehner, 8 (2d) S. W. 1057, l. c. 1059.

(e) If this Court should so construe Section 6386, R. S. Mo. 1919, as to permit the appellant, in making its tax return, to allocate all of its Government bonds to its net assets, the result, in effect at least, would be to amend a statute of the state.

(f) Whether a state statute imposing a tax violates the Federal Constitution depends upon its operation and practical effect.

International Paper Co. v. Massachusetts, 246 U. S. 135.

(g) By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon the property, it is not open to attack as in conflict with the Constitution of the United States.

Postal Telegraph Co. v. Adams, 155 U. S. 686, l. c. 697;

Galveston, Harrisburg & San Antonio Railroad v. Texas, 216 U. S. 217, l. c. 227;

New York, L. E. & W. Ry. Co. v. Pennsylvania, 158 U. S. 431, l. c. 438.

ARGUMENT.

I.

Nature of Ruling Below and Issue Here.

In determining the power of the state to impose a tax, the first useful step is to ascertain with precision the nature of the tax and upon what property it is levied; and that step must be taken by an examination of the taxing law as interpreted by the Supreme Court of the State (Home Savings Bank v. Des Moines, 205 U. S. 503, l. c. 510).

Section 6386, R. S. Mo. 1919, pursuant to which the tax was imposed, provides:

> "Sec. 6386. **Home Companies Subject to What Tax.** The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: *First of all, the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals.*"

The nature of the tax and the property upon which it is levied were definitely established by a prior decision

of the Supreme Court of Missouri, when, in State ex rel. v. Schramm, 271 Mo. 223, in speaking of what is now section 6386, it said (l. c. 226):

> "The statute (section 7098) prescribes a system of taxation of net assets."

The words of the statute set out in italics are susceptible of no other construction than that it prescribes a system of taxation of net assets, which, as the language indicates, shall be assessed as the property of individuals.

It appears from appellant's return (Tr., p. 7) that 84 per cent of its assets are taxable.

The Court below (Tr., p. 17) construed the statute as authorizing the Assessor to deduct that part of the liabilities which consists of taxable property, that is, 84 per cent of the reserve and unpaid policy claims, from the taxable assets, and assess the balance for taxation.

It computed the assessment which the Assessor was authorized to make as follows:

Total assets	$590,265.33
Government bonds (exempt)	94,000.00
Taxable assets	$496,265.33
Real estate, taxed	142,000.00
Total taxable personal property	$354,265.33
Reserve, consisting of taxable property, 84 per cent of $333,486.69	280,128.81
Net taxable personal property	$ 74,136.52

In discussing the construction to be placed upon the statute, the Court said (Tr., p. 17):

> "Section 6386 relates to the taxation of domestic insurance companies. With reference to every such company it provides that the net value of all its personal assets, or assets, or values, in excess of the legally-required reserve necessary to reinsure its outstanding risks and unpaid policy claims, shall be assessed and taxed as the property of individuals. The section, of course, deals only with property which is subject to taxation. The question in this case is: 'How shall the net value of the taxable assets be determined?' Relator claims, inferentially, that it has put its legal reserve and working capital into other securities, which are subject to taxation; and that therefore the reserve and all other liabilities should be deducted from the taxable assets alone. But surplus, earnings, undivided profits, etc., are mere bookkeeping terms. The legal reserve is not a segregated fund; it is a measure of liability, a test of solvency; the amount that would be required to make a present settlement with all of relator's policyholders, or to reinsure its risks; it is an indebtedness (State ex rel. Missouri State Life Insurance Co. v. Gehner, 8 S. W. [2d] 1068, 1072). And relator's indebtedness, legal reserve and unpaid policy claims, is a charge against all of its assets, both taxable and nontaxable.
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> * * * * * * *
>
> "We know of no more equitable way to determine such value than that of apportioning the total liability between the two classes of assets (the taxable and the nontaxable) according to their respective amounts

and then deducting from the taxable assets the liability so apportioned to that class."

The same result would have been reached had the Assessor apportioned the taxable property to the net assets, exempted that part of the net assets which consisted of government bonds, and taxed the balance.

The assets of the Missouri Insurance Company, as disclosed by its return to the tax assessor (Tr., p. 7), consist of:

Real Estate	$142,000.00
Government Bonds	94,000.00
Taxable Personal Property	354,265.33
Total	$590,265.33
Its Liabilities, Consisting of Legal Reserve and Unpaid Policy Claims are	$333,486.00

Its legal reserve and unpaid policy claims (liabilities) aggregate $333,486, which represents (approximately) 56.5% of its total assets. The remaining (approximately) 43.5% of its total assets represents the net assets, the taxation of which is provided for by the statute.

The different classes of property, of which the assets consist when apportioned between the legal reserve and unpaid policy claims (liabilities) and the net assets, are as follows:

	Liabilities 56.5%	Net Assets 43.5%	Total
Government Bonds	$ 53,110	$ 40,890	$ 94,000
Real Estate	80,230	61,770	142,000
Taxable Personal Property	200,160	154,105	354,265
	$333,500	$256,765	$590,265

The whole of the company's real estate is taxable. It has paid, or will be required to pay, taxes on the $80,230 of real estate allocated to its liabilities, as well as the $61,770 allocated to its net assets. In computing the assessment on its net assets, the company is therefore entitled to credit for having paid a tax on real estate in the amount of $142,000. The value of the balance of its net assets (taxable personal property) for the purpose of taxation, then, is computed as follows:

Total Net Assets		$256,765.00
Government Bonds Exempt	$ 40,890	
Real Estate (Taxed as other Property	142,000	182,890.00
Taxable Net Assets		$73,875.00

The result thus obtained varies slightly from that arrived at by the Missouri Supreme Court, because both computations are based on approximate percentages.

Whether that part of the reserve and unpaid policy claims which consists of taxable property is deducted from

the Company's total taxable property and the assessment is imposed on the remainder, or whether the taxable property is apportioned between the reserve and unpaid policy claims (liabilities) and the net assets, and the assessment is imposed on that part of the net assets which consists of taxable property, is a mere matter of which method of calculation shall be adopted, and the result is the same.

An appellate court reviews the judgment and not the opinion of a lower court, and the judgment ought not to be reversed, although the appellate court may be unable to agree with the reasons given for a decision which is correct (4 C. J. 1080, Note 95).

This principle was recognized and applied by this Court as early as 1820 (M'Clung v. Silliman, 6 Wheat. 598, 5 L. ed. 346).

In that case the Supreme Court of Ohio assumed jurisdiction in a case wherein application for mandamus was made against an officer of the United States, but declined to issue the writ on the merits. On writ of error to this Court, although it was held that the state court was without authority to assume jurisdiction in the cause, its judgment denying the writ was affirmed.

II.

The Statute as Construed Below Does Not Deny Government Bonds Exemption From Taxation.

It is not claimed that section 6386 as construed by the Missouri Supreme Court imposes a tax directly on Gov-

ernment bonds. The contention is that an insurance company which is taxed on its net assets is denied exemption from taxation on Government bonds when the taxing authorities treat such bonds as being invested in part in the net assets and in part in the legal reserve and unpaid policy claims.

The appellant cites and discusses decisions of this and other courts, the language of the opinion in some of which, without giving consideration to the facts in respect to which it was used, would appear to lend color to the claim that appellant has not been given exemption from taxation on the full amount of its Government bonds. For this reason, it will be necessary to discuss in detail some of the cases on which appellant relies.

The tax declared illegal in McCullouch v. Maryland, 4 Wheat. 316, and Weston v. City of Charleston, 2 Pet. 448, was imposed directly upon the obligations of the United States, as is also that prohibited by Section 3701, U. S. Revised Statutes (U. S. Comp. Stat., Sec. 6816).

Appellant says that, in National Life Insurance Co. v. United States, 277 U. S. 508, we find an analogous situation. The Act of Congress, in that case, imposed an income tax on insurance companies. A deduction of 4 per cent on the reserve was allowed, but, as the income on nontaxable securities was not included in the gross income, the deduction was decreased by an amount corresponding to the income on nontaxable securities. As a result, if the Company's income in part was from non-

taxable securities, its net income, upon which the tax was imposed, was the same as if its income was derived wholly from taxable investments. This appears from the opinion, which (l. c. 518) says:

> "The collector treated interest plus dividends plus rents, $3,824,592.78, as gross income, and allowed deductions amounting to $2,899,690.79, made up of the following items: $1,125,788.26, interest from tax-exempt securities; $1,569,490.86, the difference between 4 per cent of the reserve fund ($2,695,279.12) and ($1,125,788.26) interest received from exempt securities; miscellaneous items, not contested and negligible here, $204,411.67. After deducting these from total receipts ($3,824,592.78—$2,899,690.79), there remained a balance of $924,901.99. This he regarded as net income and upon it exacted 10 per centum, $92,490.20.
>
> "If all interest received by the company had come from taxable securities, then, following the statute, there would have been deducted from the gross of $3,824,592.78—4 per cent of the reserve, $2,695,279.12, plus the miscellaneous items $204,411.67—$2,899,-690.79, and upon the balance of $924,901.99 the tax would have been $92,490.20. Thus it becomes apparent that petitioner was accorded no advantage by reason of ownership of tax-exempt securities."

It is apparent that, by calculating the net income by this method, the company would have been subjected to the same tax if its entire gross income had been received as interest on Government securities. The effect of the act, in that case, cannot be analogous to the effect of the stat-

ute in this case, because the larger the amount of nontaxable securities this appellant owned, the less tax it would be required to pay on its net assets, and, if all of its assets were invested in nontaxable securities, it would be required to pay no taxes whatever.

In City of Waco v. Amicable Life Insurance Co., 230 S. W. (Tex. App.) 698, 248 S. W. (Tex. Com. of Ap.) 332, the statute authorized the company to deduct its reserve as a liability. The taxing authorities sought to diminish the liabilities deducted to the extent of the nontaxable securities owned by the company; in other words, to treat all of the nontaxable securities as though they were invested in the reserve. It was held that, as the reserve did not constitute any specific property set apart from the general assets, the tax-exempt securities should be first deducted from the total assets, and then the reserve should be deducted. The right of the State to apportion the taxable and nontaxable property to the reserve and to the net assets, and assess the taxable property, of which the net assets consisted, was not ruled on in that case.

In Farmers' and Merchants' Bank v. Minnesota, 232 U. S. 516, the facts as stated by the Court (l. c. 520) are:

> "Plaintiff in error is a savings bank, having no capital stock, and was taxable under Sec. 839, Rev. Laws 1905, which provides for ascertaining the surplus remaining after deducting from its assets (other than real estate, which is separately assessed) the amount of the deposits and of all other accounts payable; the surplus to be taxed as credits."

The tax involved was one imposed directly on federal securities (bonds of a municipality of the Territory of Oklahoma). What the Court said in that case must be construed in connection with the facts before it, and is, therefore, not necessarily applicable to the facts here, where the assessment is only on that part of the net assets which consist of taxable property.

In Northwestern Mutual Life Insurance Company v. Wisconsin, 275 U. S. 136, life insurance companies were required to pay a license fee of 3% on their gross income from all sources excetping income from taxable real estate and premiums on policies. The gross income thus computed included interest on securities of the United States. That case is not in point, because the tax was levied directly upon the income of Government securities, and obviously, the company's income would have been taxable even if derived wholly from interest on Government bonds.

In Miller v. Milwaukee, 272 U. S. 713, the facts as stated by appellant are that the Wisconsin law excepted from the income tax of corporations interest received on United States bonds; that the exemption was met by the State of Wisconsin by a provision that, while stockholders were not taxed upon dividends received from corporations, the income of which was assessed, yet, if only part of the corporation's income was assessed, only a corresponding part of the dividends received therefrom should be deducted from the income tax to the shareholder. A mere statement of the facts, we think, shows that the case is not

applicable, because, in the instant case, the tax is assessed only upon that part of the appellant's net assets which consists of taxable property.

In Home Savings Bank v. Des Moines, 205 U. S. 503, the statute involved provided that shares of stock of state banks should be assessed to such banks, and not to the individual shareholders. The bank owned United States bonds, which were included in the value of the stock assessed against the corporation. It was held, in effect, that, to include the Government bonds in the value of the shares, which was assessed against the bank, was equivalent to assessing the bonds, which it was beyond the power of the state to assess. No such situation is presented by the facts in our case. It is admittedly within the power of the State of Missouri to assess appellant's $590,265 worth of property, except the $94,000 of Government bonds which it owns. The statute, as construed by the state court in the present case, authorizes the Assessor to apportion the taxable and nontaxable property between two funds, one of which (net assets) the appellant owns and holds for its own use and profit, and the other of which (legal reserve and unpaid policy claims) it technically owns but holds for the benefit and protection of its policyholders, and to assess against it the taxable portion of the fund which it owns outright and relieve it from taxation on the other fund, which it holds in trust for its policyholders.

In State ex rel. v. Schramm, 271 Mo. 223, which is cited in Farmers Bank v. Minnesota, supra, the Assessor under-

took to allocate the whole of the nontaxable property of an insurance company to its legal reserve and unpaid policy claims. It was not suggested in that case that the statute authorized the Assessor to apportion the taxable property of the company between its net assets, which it held and owned for its own profit, and its legal reserve, which it technically owned but held for the protection of its policyholders, and assess the taxable portion of the net assets as the property of an individual is assessed; and the Supreme Court of Missouri did not hold that an assessment, the amount of which was arrived at in that manner, could not be lawfully imposed upon the net assets of an insurance company.

III.

Due Process and Equal Protection.

Appellant quotes from State ex rel. v. Schramm, 271 Mo., l. c. 227, where the Supreme Court of Missouri said:

> "Revenue laws sometimes permit taxpayers to deduct from the property to be taxed the debts owing by them. The allowance is not in any sense an exemption, but is made by way of reaching the just amount of taxable property."

The statute could not be held constitutional on any other theory, because the Legislature of Missouri has no power to grant exemptions from taxation except on the property

mentioned in Section 6 of Article X of the State Constitution (see appendix). In State ex. rel. v. Schramm, supra, the Court also said that the statute provides a system of taxation of net assets. The statute as construed below does no more than to authorize the taxation of **that part of the net assets which may fairly be said to consist of taxable property.**

Appellant also quotes from State ex rel. v. Buder, 315 Mo. 791, as follows:

> "To hold that the reserves of a domestic insurance company are proper subjects of taxation would be to ignore the plain terms of the statute which we have just ruled has not been repealed."

The statute as construed does not tax the appellant's reserve.

Our attention is directed to State ex rel. v. Gehner, 8 S. W. (2nd) 1068, where the Supreme Court of Missouri upheld the constitutionality of section 6386. Appellees concede that the statute as construed by the court below is constitutional.

We are next cited to the following cases, to wit:

State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2d) 1057;

State ex rel. Citizens Ins. Co. v. Gehner, 8 S. W. (2d) 1066;

State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067;

State ex rel. International Life Ins. Co. v. Gehner, 8 S. W. (2d) 1067;
State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1073.

A reading of these cases, it is asserted, will show that the law of the State of Missouri is that a domestic insurance company, under section 6386, having no tax-exempt securities, may deduct its entire reserve. If this appellant had no tax-exempt securities, the whole of its legal reserve and unpaid policy claims and its **net assets** would consist of taxable property, and, after deducting the whole of its reserve (and unpaid policy claims), it would be assessed on **all of its net assets.** Under the statute, as construed below, its assessment would then be computed as follows:

Assets	$590,265.33
Legal reserve and unpaid policy claims	333,486.69
	$256,778.64
Real estate, otherwise taxable	142,000.00
Taxable personal property	$114,778.64

Appellant, on the same page of its brief (p. 30), also says that, in three of the last-mentioned cases, it was expressly held that no assessment could be made where the amount of the reserve exceeded the amount of the taxable assets. The taxing authorities did not assert their right to appor-

tion the taxable property to the liabilities and the net assets, and their right to do so, therefore, was not ruled on.

What the Supreme Court of Missouri decided in these cases was, that section 6386 is constitutional. The Court passed upon the **constitutionality** of the statute, and not upon its **construction.** In one of the cases, State ex rel. American Automobile Insurance Co. v. Gehner, 8 (2d) S. W. 1057, supra, the Missouri Supreme Court did, however, clearly intimate that section 6386, if so construed as to permit an insurance company to apportion none of its nontaxable assets to its legal reserve, would be unconstitutional. The company in that case claimed that money on deposit outside of the state was nontaxable, and in reporting its net assets for taxation did not apportion any of its assets represented by such deposits to its legal reserve and unpaid policy claims. In discussing this phase of the company's return, the Court (l. c. 1059) said:

> "Yet all those liabilities are listed against the assets said to be in this state, and not apportioned in any way to the assets said to be out of this state. The inequity of that position should have appealed to the company in preparing its return.
>
> "Since all liabilities for policy claims are to be paid out of assets in this state, the bank deposits and premiums to be collected outside of the state are used for no purpose out of the state, but must be transmitted to the home office and become available to pay such claims, or to replace state funds used for the purpose. Thus a double deduction is inevitable.

The foreign claims are deducted, and the foreign collections out of which they are finally to be paid are deducted, from the assets. Common justice would require that claims arising in other states, on policies insuring property in other states, and paid ultimately out of the premiums collected on such policies, out of which the claims arose, **should not be listed as liabilities against assets in Missouri.** But relator strenuously contends for a narrow technical construction of section 6386, which would not only defeat its purpose, but defeat the policy of the state to maintain equality in taxation, in accordance with the demands of the Constitution.

"Further, the reserves are almost half the total assets. In what are they invested? More than one-third of the total assets are listed as either tax-exempt or out of the state. There are not enough taxable assets in the state, after paying the listed claims, to account for the reserves. Therefore, it is inevitable that the reserves are invested, in large amounts, in tax-exempt securities, or they appear in property out of the state. Thus another double deduction appears: **The reserves are deducted, and the securities and other property in which they appear as assets are deducted.** Section 6386 should not be construed so as to permit such an evasion of the constitutional requirement." (Bold type ours.)

The appellant's right to have the amount of the assessment on its personal property determined in the manner prescribed by Section 6386, R. S. Mo. 1919, rests on that statute, or it does not exist. The statute means what the highest court of the state has construed it to mean, or, in

contemplation of law, it does not exist, and personal property to the value of over $350,000.00 owned by appellant is subject to taxation under Section 12766, R. S. Mo. 1919.

We are not contending that this Court cannot, in a proper case, place its own construction upon a statute enacted by a state, but a proper case is one where the statute as construed denies the complaining party a right conferred upon it, not by the statute itself, but by the Constitution or laws of the United States, independent of the state statute. In this case, the right of appellant to have only its net assets subjected to taxation is conferred by the state law, and not by the Fourteenth Amendment, under which the appellant claims. It is only reasonable to say that when a state statute, as construed by the Supreme Court of the state, results in the imposition of a smaller assessment on the personal property owned by appellant than would be imposed upon the same property if owned by a person or corporation to whom the state statute does not apply, there can be no invasion of the appellant's rights under the Fourteenth Amendment.

Appellant says (Brief, p. 31) that the construction placed upon the statute below means "if you invest a part of your assets in Government bonds we will refuse to grant you the right to deduct the full amount of your reserve. This, in effect, means if you invest your assets in Government bonds we will tax them."

We have heretofore shown, we think, that the statute as construed below does no more than to tax the portion of

the company's net assets which consists of taxable property.

We concede that the equal-protection clause of the Fourteenth Amendment is designed to prevent intentional and arbitrary discrimination, whether occasioned by the terms of a statute or by its improper execution, as was held in Sunday Lake Iron Co. v. Wakefield, 247 U. S., l. c. 352. In that case it was claimed that the plaintiff in error was denied the equal protection of the law, because its property was assessed at full value, and other property throughout the county generally was assessed at not exceeding one-third of its value. The case, therefore, is not in point. As a matter of fact, the appellant in the present case is assessed $50,000.00 on personal property in the State of Missouri, which, if owned by an individual or an ordinary corporation, would have been assessed at more than $350,000.00.

Appellant quotes from the opinion in Southern Ry. v. Green, 216 U. S., l. c. 412, as follows:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."

If the rule stated in that case were applied literally to the appellant, it would be required to pay taxes on personal property, amounting to (Tr., p. 7) over $350,000.00.

What the Court held in Southern Railway Co. v. Green, supra, was that a license tax on a foreign corporation greater than that imposed on a domestic corporation enjoying the same privileges violates the equal-protection clause of the Fourteenth Amendment.

The case of Quaker City Cab Co. v. Pennsylvania, 277 U. S. 402, from which appellant quotes at page 34 of its brief, is not applicable. What was decided there was that the imposition of a tax on the gross receipts of corporations operating taxicabs without imposing like taxes on the receipts of individuals and partnerships engaged in the same business deprives the corporations of the equal protection of the law.

Practically all of the states treat the legal reserve of an insurance company as a fund held for the protection and security of the policyholders, and have adopted laws designed to keep it intact. This policy is reflected in the taxing laws of many of the states. In Missouri it led to the enactment of section 6386, by which insurance companies are taxed only on their net assets in excess of their legal reserve and unpaid policy claims. The highest court of the state has construed this statute to mean that in determining what part of appellant's assets is reserve set aside for the security of its policyholders, and what part

is net assets belonging to the appellant and held for its own profit, the Assessor can make a division of the nontaxable property between those two funds. The appellant has no right, under the Constitution or laws of the United States, to allocate all of its nontaxable property to its net assets, and the Missouri Supreme Court has held that it has no such right under the statute. The question, it would appear, is one of state law, in which the decision of the state court ought to be final. For this Court to hold that the Assessor cannot apportion the appellant's taxable and nontaxable property to its reserve and to its net assets would increase the extent to which the state has granted appellant immunity from taxation, and would, in effect at least, amend a statute of the state.

If the statute as construed enabled the state through some subterfuge or legal fiction to bring within the reach of the tax collector property that is exempt from taxation because of some provision of the Federal Constitution or laws, the appellant would be in a position to complain in this court. Such a case is not presented by the record. The appellant owns taxable personal property within the State of Missouri (Tr., p. 7) valued at more than $350,000.00, all of which would be subject to taxation under the laws of the state if owned by an individual or an ordinary corporation. Section 6386, as construed by the highest court of the state, authorizes the Tax Assessor to equitably apportion that and all other property appellant owns between two funds—its legal reserve and unpaid

policy claims held for the protection of its policyholders and its net assets, owned and held for its own use and benefit, and to assess that part of the personal property apportioned to the net assets. The assessment actually made against the appellant's personal property is only $50,000.00, although in the absence of the statute its personal property might have been assessed for more than $350,000.00 without violating any right which it claims under the Constitution or laws of the United States.

This Court, when considering the effect of the interstate commerce clause of the Constitution of the United States on the validity of license or privilege taxes imposed by the states, has many times ruled, in substance, that the validity of the statute depended upon its operation and practical effect (International Paper Co. v. Massachuetts, 246 U. S. 135), and that by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon the property, it is not open to attack as in conflict with the Constitution.

Postal Telegraph Co. v. Adams, 155 U. S. 686, l. c. 697;

Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, l. c. 227;

New York, L. E. & W. Ry. Co. v. Pennsylvania, 158 U. S. 431, l. c. 438.

So far as we are able to ascertain, the exact question raised in the case now before the Court has never been ruled upon.

It would seem, however, that, whether the claim is made that the result of the statute is to impose a tax upon securities of the United States, or to impose a burden upon interstate commerce, the rule ought to be the same; that is to say, that the validity of the tax depends upon the effect and operation of the statute, and that if the tax imposed pursuant thereto is no greater than the tax ordinarily imposed upon property generally within the state, it is not open to attack as in conflict with the equal-protection clause or due-process clause of the Constitution.

CONCLUSION.

Appellant's right to deduct from its taxable property any part of its legal reserve and unpaid policy claims is not a privilege or immunity conferred by the Constitution or laws of the United States, but is derived from the state statute, or does not exist. Under its previous decision in State ex rel. American Automobile Company v. Gehner, 8 (2d) S. W. 1057, supra, the state court held, in effect, that for an insurance company, in making its tax return to apportion the whole of its reserve and unpaid policy claims to its taxable property would defeat the purpose of the statute, by bringing it into conflict with the Constitution of the state. The court below, in this case, construed the statute as authorizing the Assessor to apportion a fair amount of the nontaxable property of an insurance company to its net assets, and to tax the net assets so determined as the property of an individual. Unless the

statute, as construed by the state court, is valid, all of appellant's property, except $94,000, which is invested in Government bonds, is subject to taxation under the general laws of the state.

We have heretofore submitted briefs in opposition to jurisdiction on appeal and on certiorari, and respectfully ask that they be considered in connection with our brief on the merits.

We submit that on the record the appellant is not entitled to relief from the assessment made upon its net assets, and that if the Court retains jurisdiction, the judgment of the state court should be affirmed.

Respectfully submitted,

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APPENDIX.

Sections 6 and 7 of Article X of the Constitution of Missouri are as follows:

"Sec. 6. **Property exempt from taxation.**—The property, real and personal, of the state, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities and towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also such property, real or personal, as may be used exclusively for agricultural or horticultural societies: **Provided**, That such exemptions shall be only by general law.

"Sec. 7. **Other exemptions void.**—All laws exempting property from taxation, other than the property above enumerated, shall be void."

The general law of the state governing the return and assessment of property for taxation (Section 12766, Revised Statutes of Missouri 1919, as amended, Laws of Missouri 1923, page 275), so far as here material, provides:

"Sec. 12766. The Assessor * * * shall * * * proceed to take a list of the taxable personal property in his county, town or district and assess the value thereof in the manner following, to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such person to make a correct state-

ment of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise, which may be required to pay a license tax, being in any county of this state, in accordance with the provisions of this chapter; and the person listing the property shall enter a true and correct statement of such property on a printed or written blank prepared for this purpose * * *."

Section 6386, Revised Statutes of Missouri 1919, so far as pertinent, reads:

"Sec. 6386. **Home companies subject to what tax.**—The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals."

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 222.—October Term, 1929.

State of Missouri, ex rel. Missouri Insurance Company, Appellant,
vs.
Frederick Gehner, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis, et al., etc.

Appeal from the Supreme Court of the State of Missouri.

[April 14, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

Appellant is an insurance company organized under the laws of Missouri. It maintains that as construed in this case § 6386, Revised Statutes of Missouri, 1919, is repugnant to the Constitution and laws of the United States.

Section 6386 provides:

"The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals . . . ".

The company made a return in pursuance of that section. The total value of its personal property was $448,265.33 including $94,000 in United States bonds. The legal reserve and unpaid policy claims amounted to $333,486.69. It deducted such bonds,

reserve and claims leaving $20,778.64 as the net value to be taxed.[1]

The board of equalization declined to accept the return and after hearing the parties held that the bonds of the United States are not taxable, that § 6386 contravenes provisions of the state constitution requiring uniform taxation, and that therefore the company was not entitled to deduct the amount of such reserve and claims. The board assessed the company's taxable property at $50,000 without disclosing how it arrived at the amount.

On the company's application, the state supreme court issued its writ of certiorari to bring up for review the record and action of the board. The court held the section valid, found the company's liabilities were chargeable against all its assets—taxable and nontaxable alike — declared that such reserve and claims should be apportioned between the two classes of assets according to their respective amounts and determined that approximately 79.03 per cent. of such liabilities should be deducted from the value of the taxable personal property leaving $90,710.80 as the net value to be taxed.[2] And as that exceeded the amount fixed by the board, the court refused to disturb the assessment, and entered judgment quashing the writ.

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[1]The substance of the return follows:

Real Estate, Improvement, etc.		$142,000.00
Bonds, Municipals		289,000.00
Bonds, Government		94,000.00
Bonds, Mortgages		60,000.00
Cash		5,265.33
Total Assets		$590,265.33
Less Real Estate assessed as above and on which the Company pays taxes	$142,000.00	
Less reserve required by law	326,522.69	
Less U. S. Government Bonds	94,000.00	
Less Unpaid Policy Claims	6,964.00	$569,486.69
		$20,778.64

[2]The calculation in the first opinion was in substance as follows:

The court divided total taxable assets $354,265.33 ($349,000 bonds and $5,265.33 cash) by total personal assets $448,265.33 ($349,000 bonds, $5,265.33 cash and $94,000 United States bonds). The result was .7903. Total liabilities $333,486.69 ($326,522.69 reserve and $6,964.00, unpaid policy claims) was multiplied by .7903. The result was $263,554.53. This was subtracted from $354,265.33, and the difference was $90,710.80.

The company made a motion for rehearing on the ground, among others, that § 6386 as construed violated the clause of § 8, Art. I, of the Constitution which gives to Congress the power to borrow money on the credit of the United States and also § 3701, Revised Statutes (31 U. S. C., § 742) which provides that all bonds of the United States shall be exempt from taxation by or under state, municipal or local authority. The court overruled the motion and modified its opinion. The modified opinion was the same as the earlier one except as to details of calculation. It found $74,136.52 to be the taxable net value.[3] The court did not refer to the federal questions raised by the motion for rehearing.

1. It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. *Citizens National Bank* v. *Durr*, 257 U. S. 99, 106. But here the company, at the first opportunity, invoked the protection of the federal Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States. The board of equalization completely eliminated the bonds from its calculations, and there is nothing in the language of the section to suggest that it authorizes any diminution of the amount of the deductible reserve and unpaid claims or an apportionment of such liabilities between taxable and nontaxable assets. It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke federal protection against the taxation of its United States bonds. Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the State the federal questions here presented and is entitled to have them considered. *Saunders* v. *Shaw*, 244 U. S. 317, 320. *Ohio, ex rel. Bryant* v. *Akron Park District*, — U. S. —.

2. It is elementary that the bonds or other securities of the United States may not be taxed by state authority. That immunity always has been deemed an attribute of national supremacy and

[3]The court divided total taxable assets $496,265.33 ($349,000 bonds, $5,265.33 cash, and $142,000 real estate) by total assets $590,265.33 ($349,000 bonds, $5,265.33 cash, $94,000 United States bonds and $142,000 real estate). The result was .84. Total liabilities $333,486.69 was multiplied by .84. The result was $280,128.81. This was subtracted from $354,265.33, taxable personal assets, and the difference was $74,136.52.

essential to its maintenance. The power of Congress to borrow money on the credit of the United States would be burdened and might be destroyed by state taxation of the means employed for that purpose. As the tax-exempt feature tends to increase and is reflected in the market prices of such securities, a state tax burden thereon would adversely affect the terms upon which money may be borrowed to execute the purposes of the general government. It necessarily follows from the immunity created by federal authority that a State may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt government securities. Neither ingenuity in calculation nor form of words in state enactments can deprive the owner of the tax exemption established for the benefit of the United States. *Nat'l. Life Ins. Co.* v. *United States,* 277 U. S. 508, 519, and cases cited. *M'Culloch* v. *Maryland,* 4 Wheat. 316, 431, 432, 436.

After deducting government bonds (exempt), real estate (otherwise taxed), legal reserve and unpaid policy claims from total assets, there remained the amount returned by appellant, $20,778.64. The court held the section to require the reserve and unpaid claims to be reduced by the proportion that the value of the United States bonds bears to total assets. It found $74,136.52 to be appellant's taxable net value. And so it used the value of the bonds, $94,000, to increase the taxable amount by $53,357.88.

The section discloses a purpose as a general rule to omit from taxation sufficient assets of the insurance companies to cover their legal reserve and unpaid policy claims. It would be competent for the State to permit a less reduction or none at all. But where as in this case the ownership of United States bonds is made the basis of denying the full exemption which is accorded to those who own no such bonds this amounts to an infringement of the guaranteed freedom from taxation. It is clear that the value of appellant's government bonds was not disregarded in making up the estimate of taxable net values. That is in violation of the established rule. *Nat'l. Life Ins. Co.* v. *United States, supra. Northwestern Ins. Co.* v. *Wisconsin,* 275 U. S. 136. *Miller* v. *Milwaukee,* 272 U. S. 713.

Judgment reversed.

The CHIEF Justice concurs on the ground that this case is governed by *National Life Ins. Co.* v. *United States,* 277 U. S. 508.

SUPREME COURT OF THE UNITED STATES.

No. 222.—October Term, 1929.

State of Missouri, *ex rel.* Missouri Insurance Company, Appellant, *vs.* Frederick Gehner, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis, et al., etc.	Appeal from the Supreme Court of the State of Missouri.

[April 14, 1930.]

Opinion of Mr. Justice Stone.

To state the problem now presented in its simplest concrete form, if an insurance company has policy liabilities of $100,000, $100,000 of taxable personal property, and $100,000 of government bonds, its net assets would be $100,000. Under the statute of Missouri taxing net assets, as applied by the state court, one-half of this net worth or $50,000 would be subject to the tax since one-half of its entire property consists of taxable assets and so contributes one-half of the net. Under the decision of this Court, the company would go tax free, on the theory that the Constitution requires that in ascertaining the taxable net worth, tax exempt bonds must be excluded from the computation as though they were not liable for the debts of the taxpayer.

That conclusion appears to me to open a new and hitherto unsuspected field of operation for the immunity from taxation enjoyed by national and state securities as instrumentalities of government, and to accord to their owners a privilege which is not justified by anything that has been decided or said by this Court.

Since *Weston* v. *Charleston*, 2 Pet. 449, this Court, by a long line of decisions, has so restricted the immunity as to relieve only from the burden of taxation imposed on such securities or their income. The immunity has not been supposed to confer other special benefits on their owners. In every case it has been consistently applied so as to leave reasonable scope for the exercise by both

national and state governments of the constitutional power to tax. *Railroad* v. *Penniston,* 18 Wall. 5; *Plummer* v. *Coler,* 178 U. S. 115; *South Carolina* v. *United States,* 199 U. S. 437, 461; *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, 162-165; *Greiner* v. *Lewellyn,* 258 U. S. 384; *Blodgett* v. *Silberman,* 277 U. S. 1, 12; see *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523, 524.

The present tax differs from those which have previously been considered by the Court in this connection, in that it is not imposed on any specific identifiable property or its income. It is a tax on net worth, the value of the taxpayer's property after providing for the policy liabilities. Net worth is the result of a mathematical computation, into which of necessity enter all his assets subject to liabilities and all such obligations of the taxpayer as the statute permits to be deducted. It is the result of the computation which is the subject of the tax, and it is the subject of the tax to which exemptions are to be applied.

The immunity of government bonds from taxation does not carry with it immunity from liability for debts. *Scottish Insurance Co.* v. *Bowland,* 196 U. S. 611, 632. Hence, whether the measure of the tax be technically described as taxable net worth or as taxable assets less an allowed deduction representing liabilities to which they are subject, the state, in fixing the tax, does not infringe any constitutional immunity by requiring liabilities to be deducted from all the assets, including tax exempt bonds, or, what comes to the same thing, by deducting from taxable assets their proportionate share of the burden of policy liabilities.

To say that debts must be deducted from taxable assets alone; that no part of the net worth of the taxpayer who owns tax-free securities may be taxed if his debts equal his tax-free assets, is equivalent to saying, in such a situation, either that the taxable assets constitute no part of the net worth or that, even though they are a part, still that part is not taxable. But it is not to be supposed that a mathematician, an accountant or a business man would regard the taxable assets as contributing nothing to surplus, or, where one-half of the taxpayer's property is tax-free, that there is any basis for saying that net worth could, on any theory, be attributed more to one class of assets than the other. Yet the result now reached would seem to presuppose that the tax-exempt securities alone had contributed to the taxpayer's net worth. These

incongruous consequences of the rule applied seem to be attributable to the only assumption on which the rule itself could proceed, that government bonds, because they are tax-exempt, are also debt-exempt, or may not be used for the payment of debts, when in fact and in law tax-exempt securities constitute a part of the corporate reservoir of capital, all of which without distinction may be drawn on for the payment of obligations.

If Missouri, as it undoubtedly might, had levied a tax on all the property of appellant except its tax exempt bonds, without any deduction for its policy reserve, it is difficult to see upon what articulate principle the tax would be rendered invalid by permitting the taxpayer to deduct from the value of its assets, the same proportion of all its reserves which the taxable assets bear to the total property, all of which is liable for its policies. It would certainly not be because the ownership of the bonds was discriminated against in the apportionment of the deduction, or burdened by the tax. Or if, one-half of the gross assets of a taxpayer being chattels without the state, it had taxed his property within the state allowing as a deduction one-half his indebtedness, I do not suppose it would have occurred to anyone to say that the levy was invalid as a tax upon the property beyond the taxing jurisdiction. Yet neither of these taxes differs from the present in its effect on the ownership of either taxable or tax-free property.

The apportionment of net worth according to the amounts of the constituent elements which enter into its computation has long been a familiar method of accountants and has repeatedly been incorporated in taxing statutes where, for one reason or other, it is desirable or necessary not to impose a tax on some of these elements. The fairness and accuracy of that method has not hitherto been questioned.

In *National Leather Company* v. *Massachusetts*, 277 U. S. 413, the state levied a tax upon "such proportion of the fair cash value of all the shares constituting the capital stock . . . as the value of the assets . . . employed . . . within the Commonwealth . . . bears to the total assets of the corporation." The fair cash value of all the shares was, like net worth, the result of subtracting all the obligations of the company from its gross assets. See *National Bank of Wellington* v. *Chapman*, 173 U. S. 205, 215; cf. *State Railroad Tax Cases*, 92 U. S. 575. The proportion of the net worth which was taxable because attributable to Massachusetts was com-

puted after the deduction was made. If the theory of tax immunity here sustained had been followed, all the debts of the company would have been deducted from that part of the gross assets attributable to the state, since a taxpayer whose gross assets were all taxable would have had that privilege. While the methods of computing the taxable portion of net worth vary, the principle that "deductions for obligations" are to be apportioned among taxables and non-taxables is supported in *Underwood Typewriter Company* v. *Chamberlain*, 254 U. S. 113; *Bass, Ratcliff &c., Ltd.* v. *Tax Commission*, 266 U. S. 271; *Shaffer* v. *Carter*, 252 U. S. 37, 56, 57; and *U. S. Glue Company* v. *Oak Creek*, 247 U. S. 321, 324, 325.[1]

It is said that the present tax must be held invalid because, as a matter of law, exemptions may not be reduced ~~or eliminated~~[2] nor

[1]The difference between the two methods may be illustrated by supposing a corporation with gross assets of $15,000,000 and obligations of $5,000,000. The fair cash value of all the shares would then be $10,000,000. Assume that one-tenth of its property is in Massachusetts. The assessment would be $1,000,000 under the *Leather Company* case. By the present method $5,000,000 would be deducted from one-tenth of the gross assets, $1,500,000, because a concern owning no exempt property might make that deduction. Under the present case the company would be free from tax.

In *Shaffer* v. *Carter*, Oklahoma levied a net income tax; in the case of residents, upon income derived from all sources; in the case of non-residents, upon locally derived income. Residents were permitted to deduct all losses, non-residents were permitted deductions only for local losses. The Court said (p. 57):

"The difference, however, is only such as arises naturally from the extent of the jurisdiction of the state in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination. As to residents it may, and does, exert its taxing power over their income from all sources, whether within or without the State, and it accords to them a corresponding privilege of deducting their losses, wherever these accrue. As to non-residents, the jurisdiction extends only to their property owned within the State and their business, trade or profession carried on therein, and the tax is only on such income as is derived from those sources. Hence there is no obligation to accord to them a deduction by reason of losses elsewhere incurred."

There seems to be as colorable reason in that case as in this for asserting that the receipt of exempt income is made the basis for a reduction or elimination of an exemption granted to others.

[2]~~So long as the taxpayer had any outstanding policies the present statute could never *eliminate* their deduction until all its assets were tax exempt, when, of course, they alone would contribute to net worth, which would then be tax-free. However great the proportion of tax-exempt property short of the whole, there would still be some deduction. Taxable net worth would never quite equal the value of taxable property.~~

may tax burdens be increased in consequence of the ownership of tax-free securities, and that in the present case their ownership was in fact used to increase taxable values. Neither proposition can, I think, be supported. First, it is not universally true that ownership of tax exempt securities may not increase the burden of a tax. Taxes upon transfer at death, state or federal, may be increased by the ownership by deceased of tax exempt securities. *Plummer* v. *Coler, supra; Knowlton* v. *Moore,* 178 U. S. 41; *Greiner* v. *Lewellyn, supra; Blodgett* v. *Silberman, supra.* Notwithstanding *McCallen* v. *Massachusetts,* 279 U. S. 620, I do not understand that tax exempt securities of a corporation, or the income from them, may under no circumstances enter into the computation of a corporate franchise tax and increase it proportionately, or that a broker or dealer in securities may not be taxed on his profits from the purchase and sale of government and state securities. Compare *Peck & Co.* v. *Lowe,* 247 U. S. 165; *Barclay & Co.* v. *Edwards,* 267 U. S. 442. In *National Leather Company* v. *Massachusetts, supra,* an increase of property outside the taxing state might increase the tax on net assets within the state. For like reasons it would seem that the tax-free securities might rightly enter into the computation of net worth since they are liable for debts and so contribute to net worth, and that the net worth thus computed should be held subject to the state tax except insofar as tax exempt securities contribute to it.

Second, in the present case, it is difficult to see in what respect the mere ownership of the appellant's tax-free securities has been resorted to in order to increase taxable net values. That conclusion does not follow from the fact that the state court in its second opinion found a larger taxable value upon a different interpretation of the statute than in its first. It could be true only if, by the consistent application of the rule finally laid down, the shifting of some of the taxpayer's investments from taxable to exempt securities would result in an increase of the tax. But such is not the effect of the statute, for if the taxpayer who owns no exempt property may be taxed on his full net worth, but is taxed only half as much if he converts one-half of his gross assets into tax exempt bonds, it would seem that ownership of the latter had resulted in a decrease and not an increase of taxable values and that the burden of the tax is diminished with mathematical exactness in the proportion that the taxpayer has chosen to invest in tax exempt securities.

Invoking the rule now laid down, a taxpayer having no tax exempt securities and legitimately bearing the burden of a state tax on net worth may put off the burden completely by the simple expedient of purchasing, on credit, government bonds equal in value to his net taxable assets. The success of a device so transparently destructive of the taxing power of the state may well raise doubts of the correctness of the constitutional principle supposed to sustain it. So construed, the Constitution does more than protect the ownership of government bonds from the burdens of taxation. It confers upon that ownership an affirmative benefit at the expense of the taxing power of the state, by relieving the owner from the full burden of taxation on net worth to which his taxable assets have in some measure contributed.

But it is no less our duty to recognize and protect the powers reserved to the state under the Constitution than the immunities granted to the federal government. *South Carolina* v. *United States, supra.* The right of the state to tax net worth, so far as it is attributable to taxable assets, and that of the national government to insist upon its exemption so far as tax-free property enters into its computation, stand on an equal footing. There is nothing in the Constitution nor in the decisions of this Court to justify a taxpayer in demanding that the one should be sacrificed to the other, or which would support the national government in saying to the state that in ascertaining taxable net worth debts must be deducted from taxable assets alone, any more than it would support the state in insisting that debts should be deducted exclusively from the taxpayer's government bonds in ascertaining taxable net worth.

Nothing said by this Court in *National Life Insurance Co.* v. *United States,* 277 U. S. 508, decided one week later than the *National Leather Company* case, *supra,* should lead to a reversal of the judgment below. In that case an Act of Congress taxing the income of insurance companies granted an exemption of 4% of their reserve. By the terms of the statute the benefit of the exemption was withheld to the extent that the taxpayer received income from tax exempt securities. The statute regulated only the exercise of the power of the national government to tax. Neither it nor the decision of the court affected the taxing power of a state. The statute was assailed solely on the ground that it discriminated against the holder of tax exempt securities merely because they were tax-exempt, to the extent that the statutory exemption was

withheld from the holder of government, state and municipal bonds. The effect of this discrimination was that if the taxpayer shifted investments from its taxable to its tax exempt list its tax remained undiminished until the income from the tax-free list equalled the statutory exemption.

After pointing out that the collector in applying the statute had diminished the statutory exemption by the amount of interest received from tax exempt securities, the court said, p. 519: "Thus he [the tax collector] required petitioner to pay more upon its taxable income than could have been demanded had this been derived solely from taxable securities. If permitted, this would destroy the guaranteed exemption. One may not be subjected to greater burdens upon his taxable property solely because he owned some that is free".

But the present statute has no such effect. Calling the deduction of policy liabilities, required for the computation of the tax, an "exemption" and saying that ownership of tax exempt securities is made the basis of denying the "full exemption", may give this case a verbal resemblance to that, but it does no more. True, a change by appellant from taxable to tax free investments would result in a smaller deduction from its taxable assets, but it would also result in a proportionate reduction of its taxable assets with a corresponding decrease in taxable values, always in exact proportion to appellant's investment in tax exempt securities.

Only if the taxpayer were the fortunate recipient of a gift of tax exempt securities could the net worth of its taxable securities be increased and this not solely or at all because its newly acquired securities are "free", but because they, like its taxable assets, may be used to meet policy obligations, and thus proportionately relieve taxable assets from that burden. Similarly, a gift by way of payment of policy obligations or reinsurance would increase the tax although it would not increase taxable assets. So the increase, by gift, of property outside the state would increase the tax upon net assets within the state. The property outside the state is not subject to a tax, but it must pay its share of the debts. But in every case, as in the present, the tax assessed would correspond with mathematical exactness to the contributions made by the taxable assets to the total net worth. Hence, the question here is not whether the taxpayer has been discriminated against because he

owns government bonds, but only whether the privilege which the state recognizes as attaching to their ownership is sufficiently great.

If the constitutional inhibition is not directed against the imposition of burdens, but affirmatively compels the annexation of such benefits to the ownership of government bonds as will increase their currency and stimulate the market for them, even though those privileges are extended at the expense of the constitutional powers of the states, it is difficult to see what the limits of such a doctrine may be. I suppose that the sale and market value of government bonds would be materially increased if we were to say that the Constitution *sub silentio* had forbidden their seizure for debts, or rendered their possessor immune from the various forms of state taxation to which this Court has said he is subject. But however desirable such a consequence might be thought to be, that could hardly be taken as a sufficient ground for saying it.

I think the judgment should be affirmed.

Mr. Justice Holmes and Mr. Justice Brandeis concur in this opinion.